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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 172.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

CAMDEN IRON WORKS.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 31, 1900.

(17,691.)

19846

(17,591.)

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1 In the Court of Appeals of the District of Columbia.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
CAMDEN IRON WORKS. } No. 884.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS
vs.
THE DISTRICT OF COLUMBIA. } No. 37661. At Law.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration and Rule to Plead.

Filed Feb. 26, 1895.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS (a Corporation), Plaintiff,
vs.
THE DISTRICT OF COLUMBIA (a Corporation), Defendant. } At Law. No. 37661.

The plaintiff, a corporation created and existing under and by virtue of the laws of the State of New Jersey, sues the defendant, a municipal corporation created and existing under and by virtue of the laws of the United States, for money payable by the defendant to the plaintiff, for that whereas by certain articles of agreement bearing date the 29th day of June, A. D. 1887, between the plaintiff corporation, acting through and by Walter Wood, its president, and sealed with its corporate seal, of the one part, and the said District of Columbia, acting through and by William B. Webb, Samuel E. Wheatley, and William Ludlow, its Commissioners, duly authorized in that behalf and sealed with their seals, of the other part, it was covenanted, promised, and agreed upon as follows, viz: First, the plaintiff corporation, for the consideration therein mentioned and contained, did covenant, promise, and agree to and with the said defendant that it, the plaintiff corporation, should and would furnish and deliver unto the defendant, in the District of Columbia,
2 the following-described cast-iron pipe, to wit: 9,000 feet, more or less, of twelve-inch cast-iron pipe; 10,000 feet, more or less, of six-inch cast-iron pipe; 15,000 feet, more or less, of four-inch cast-iron pipe, and 10,000 feet, more or less, of three-inch cast-iron pipe;

and, second, the defendant corporation, acting as aforesaid, did by said articles of agreement covenant, promise, and agree to pay the plaintiff for said pipe so to be delivered the following prices, to wit:

For the twelve-inch pipe, one and $\frac{56}{100}$ (1.56) cents per pound;

For the six-inch pipe, one and $\frac{62}{100}$ (1.62) cents per pound;

For the four-inch pipe, one and $\frac{66}{100}$ (1.66) cents per pound;

For the three-inch pipe, one and $\frac{79}{100}$ (1.79) cents per pound, upon the receipt and acceptance of said pipe, less twenty per cent. (20 %) of the amount thereof, to be retained until the completion of said contract; and the plaintiff corporation in fact says that it always from the time of making said agreement did well and truly do, observe, perform, and fulfill all and everything in said articles of agreement contained on its part to be done, observed, performed, and fulfilled, except in so far as it was prevented or discharged from so doing by the defendant, and that in the performance of said articles of agreement it did furnish and deliver to the defendant the following-described pipe, to wit, 679,785 pounds of twelve-inch pipe, 148,755 pounds of six-inch pipe, 164,366 pounds of four-inch pipe, and 33,962 pounds of three-inch pipe, the last of said pipe having been delivered by the plaintiff corporation and accepted by the defendant corporation, and the said contract thereby completed, on or about the 27th day of February, A. D. 1888; which said pipe so furnished were received and accepted by the defendant, and thereby the defendant became liable to pay the plaintiff for the pipe so delivered and accepted the sum of $16,350.87, according to the form and effect of said articles of agreement, but therein failed and made default and paid the plaintiff only the sum of $5,291.71 on account thereof, and although often requested to pay the balance of $11,059.16, still so as aforesaid remaining due the plaintiff, wholly refused to pay the same or any part thereof, and wholly neglected so to do, contrary to the form and effect of said articles of agreement made as aforesaid; by reason of which said premises and by force of said articles of agreement an action has accrued to the said plaintiff to demand and have of and from the said defendant the said sum of $11,059.16 above demanded, with interest from the 27th day of February, A. D. 1888; yet the said defendant, although often requested, did not and has not paid the said plaintiff the said sum of $11,059.16, with interest thereon from the 27th day of February, A. D. 1888, or any part thereof, but to pay the same or any part thereof has hitherto wholly refused and still refuses, to the great damage of the plaintiff, and therefore the plaintiff brings its suit.

And the plaintiff claims $11,059.16, with interest thereon from the 27th day of February, A. D. 1888, besides the costs of this suit.

SAM'L MADDOX,
Attorney for Plaintiff.

3 The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

SAM'L MADDOX,
Attorney for Plaintiff.

Defendant's Pleas.

Filed Mar. 25, 1895.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 37661.

The defendant for pleas says:

1. The defendant did not covenant in manner and form as in the plaintiff's declaration alleged.

2. The defendant did not promise in manner and form as in the plaintiff's declaration alleged.

3. The defendant denies the said alleged breaches of the said convenants, each and every of them, in manner and form as in the plaintiff's declaration alleged, and says it did not commit the same or any of them or any part *of* thereof.

4. The defendant says it fully performed each and every covenant and agreement on its part to be done and performed as set forth in the alleged contract in the plaintiff's declaration mentioned.

5. The defendant says that before action — brought it satisfied and discharged the plaintiff's claim by payment.

6. The defendant says it never was indebted as alleged in the plaintiff's declaration.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Defendant.

Joinder of Issue.

Filed Apr. 9, 1895.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 37661.

The plaintiff joins issue upon the defendant's first, second, third, fourth, fifth, and sixth pleas.

SAM'L MADDOX,
Attorney for Plaintiff.

4 *Defendant's Additional Pleas and Affidavit.*

Filed Dec. 16, 1896.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS, a Corporation,
vs.
THE DISTRICT OF COLUMBIA. } At Law. 37661.

The defendant, with leave of the court first had and obtained, files the following additional pleas:

7. The defendant for further plea says that the alleged articles of agreement bearing date the 29th day of June, 1887, in the declaration mentioned, is not its deed.

8. And for further plea the defendant says that the plaintiff at the commencement of this suit was and still is indebted to the defendant in the sum of $12,115.73 for penalties incurred by the said plaintiff by reason of its failure to perform the conditions of the said articles of agreement bearing date June 29th, 1887, between the said plaintiff and this defendant, set up in the declaration, and by reason of its failure to deliver the pipe contracted for within the contract time, and for the value of other pipe which this defendant was compelled to purchase in order to supply the place of the pipe plaintiff failed to deliver, and for the amount paid out and expended by this defendant for cost of inspection, freight, etc., in connection therewith, as appears by the particulars of said debt, hereto annexed, and it is willing that the same may be set off against the plaintiff's demand.

9. And for a further plea the defendant says that the plaintiff's cause of action did not accrue within three years before the commencement of this suit.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Defendant.

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared John W. Ross, George Truesdell, and Charles F. Powell, who, being first duly sworn, depose and says they are Commissioners of the District; that the foregoing pleas are filed in this cause not for purposes of delay, but in order to enable the court to determine the merits of the matter in controversy between the plaintiff and the District of Columbia, and they further say that the alleged articles of agreement, dated January 29th, 1887, set up in the plaintiff's declaration, is not the deed of the defendant, The District of Columbia.

JOHN W. ROSS.
GEO. TRUESDELL.
CHAS. F. POWELL.

Subscribed and sworn to before me this 27th day of October, 1896.

WILLIAM TINDALL,
Notary Public.

[SEAL.]

5

Camden Iron Works to the District of Columbia, Dr.

For Pipes Purchased Outside Camden Iron Works Millville Foundry.

From Berwick, Pa.:					
3", 14 456-2240 tons, @ $41.00 (31,816 lbs.)			582.35		
6", 47 1978-2240 " " 33.50 (107,258 ")			1,604.08		
				2,186.43	
Paid freight (special rates, $.015 per 100 lbs.)				208.60	
					2,395.03
From Sayre, Pa.:					
3", 5 1176-2000 tons, @ $34.00; 11,176 lbs. @ 1.70c			189.99		
4", 54 1804-2000 " " 32.00; 109,804 " " 1.60c			1,756.86		
6", 22 648-2000 " " 31.25; 44,648 " " 1.5625c			697.62		
				2,644.47	
Paid freight and charges on above pipes				305.70	
					2,950.17
Inspectors' extra expenses on above work, less 3 weeks' board, absent from Millville					30.09
					5,375.29
For pay of inspectors at Millville after contract time, from Nov. 10 to Dec. 5, inc., 21 days, 3 4-7 weeks' board					103.64
For delays in delivering pipes on contract time:					
3" pipes, 16 days, 31,816 lbs., @ 1.79c	569.51	@ 16 $	91 12		
19 " 6,661 " " "	119.23	" 19 $	22 65		
36 " 33,962 " " "	607.92	" 36 $	218 85		
				332 62	
4" pipes, 17 days, 36,479 " @ 1.66c	605.55	@ 17 $	102 94		
18 " 25,969 " " "	431.08	" 18 $	77 59		
19 " 21,236 " " "	352.52	" 19 $	66 98		
20 " 26,120 " " "	433.59	" 20 $	86 72		
45 " 22,457 " " "	372.79	" 45 $	167 76		
76 " 4,824 " " "	80.08	" 76 $	60 86		
36 " 137,085 " " "	2,275.61	" 36 $	819 22		
				1,382 07	
6" pipes, 16 days, 143,645 " " 1.62c	2,327.05	@ 16 $	372 33		
18 " 6,685 " " "	108.30	" 18 $	19 49		
6 " 94,525 " " "	1,531.30	" 6 $	91 88		
36 " 54,230 " " "	878.53	" 36 $	316 27		
				799 97	
12" pipes, 45 days, 194,109 " " 1.56c	3,028.10	@ 45 $	1,362 64		
76 " 108,123 " " "	1,686.72	" 76 $	1,281 91		
85 " 37,198 " " "	580.29	" 85 $	493 25		
45 " 72,649 " " "	1,133.32	" 45 $	509 99		
54 " 56,309 " " "	878.42	" 54 $	474 35		
				4,122 14	
					6,636 80
					$12,115 73

Replications to Seventh and Eighth Pleas.

Filed Jan. 8, 1897.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS
vs.
DISTRICT OF COLUMBIA. } At Law. No. 37661.

1. The plaintiff joins issue upon the defendant's seventh plea.

2. And the plaintiff, for replication to the defendant's eighth plea, says it never was indebted to the defendant in manner and form as in said plea alleged.

SAM'L MADDOX,
Attorney for Plaintiff.

6 *Demurrer to the Ninth Plea.*

Filed Jan. 8, 1897.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS
vs.
DISTRICT OF COLUMBIA. } At Law. No. 37661.

The plaintiff says the ninth plea of the defendant is bad in substance.

SAM'L MADDOX,
Attorney for Plaintiff.

NOTE.—One of the matters of law intended to be argued is that the said plea is not responsive to the declaration, and presents no triable issue, for the reason that the plea alleges that the cause of action did not accrue within three years, when by laws in force in the District of Columbia a plea of the statute of limitations in an action of covenant upon a sealed instrument should aver that the cause of action did not accrue within twelve years.

Stipulation.

Filed Jan. 8, 1897.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS
vs.
DISTRICT OF COLUMBIA. } At Law. No. 37661.

It is hereby stipulated between counsel for the plaintiff and for the defendant that the demurrer to the ninth plea shall be heard at the trial of this cause.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for the District of Columbia.
SAM'L MADDOX,
Attorney for Camden Iron Works.

Memorandum.

March 13, 1897.—Demurrer to ninth plea sustained.

Memorandum.

January 23, 1899.—Verdict for plaintiff for $11,044.16, with interest from February 27, 1888.

7 Supreme Court of the District of Columbia.

SATURDAY, *February* 4, 1899.

Session resumed pursuant to adjournment, Justice Bradley presiding.

* * * * * * *

CAMDEN IRON WORKS, a Corporation, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 37661.

Upon hearing the defendant's motion for a new trial, it is considered that the same be, and hereby is, overruled and judgment on verdict is ordered. Therefore it is considered that the plaintiff recover against the defendant eleven thousand and forty-four dollars and sixteen cents ($11,044.16), with interest thereon from the 27th day of February, 1888, being the money payable by it to the plaintiff by reason of the premises, together with its costs of suit, to be taxed by the clerk, and have execution thereof.

Order for Appeal to Court of Appeals.

Filed Feb. 6, 1899.

In the Supreme Court of the District of Columbia, the 6 Day of February, 1899.

CAMDEN IRON WORKS
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. —.

The clerk of said court will please enter an appeal to the Court of Appeals from the judgment granted in the above cause and issue citation to plaintiff.

S. T. THOMAS,
A. B. DUVALL,
Attorney- for Defendant.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS, a Corporation,
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 37661.

The President of the United States to the Camden Iron Works, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office, supreme court of the District of Columbia, on the 6th day of February, 1899, wherein The District of Columbia is appellant and you are appellee, to show cause, if any

there be, why the judgment rendered against the said appel-
8 lant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 6th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 8th day of February, 1899.

SAM'L MADDOX,
Attorney for Appellee.

Supreme Court of the District of Columbia.

THURSDAY, *February* 23, 1899.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

This case was tried by Justice Bradley.

THE CAMDEN IRON WORKS
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 37661.

Now again comes here the defendant, by its attorneys, and tenders to the court here its bill of exceptions taken during the trial of this cause, and prays that the same may be duly signed, sealed, and made part of the record, now for then, which is done accordingly.

Bill of Exceptions.

Filed Feb. 23, 1899.

In the Supreme Court of the District of Columbia.

THE CAMDEN IRON WORKS
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 37661.

Be it remembered that at the trial of this cause, on the 23rd day of January, A. D. 1899, before the Honorable A. C. Bradley, associate justice of the supreme court of the District of Columbia, and a jury regularly impaneled and sworn to try the issues joined between the plaintiff and the defendant, the plaintiff, to maintain and prove the issues on its part joined, produced as a witness WILLIAM TINDALL, who testified on direct examination as follows:

That he is secretary of the Board of Commissioners of the District of Columbia. The witness thereupon produced the original

contract mentioned in the declaration in this cause, and
9 testified that the signatures of William B. Webb, Samuel E. Wheatley, and William Ludlow to said contract No. 815 were their genuine signatures, and that they were at the time of the signing of said contract Commissioners of the District of Columbia; that this contract had been duly copied in a book kept for that purpose in the office of the Commissioners, as required by the act of Congress approved June 11, 1878.

Whereupon counsel for the plaintiff offered to give said contract in evidence.

To which offer counsel for the defendant, at the time the same was made and before the said contract was given in evidence, objected upon the ground that the declaration filed in this cause is in covenant and declares upon a sealed instrument, whereas the contract offered in evidence to the jury is not under the seal of the District of Columbia and is not the covenant, but the simple contract, of the District of Columbia; but the presiding justice overruled said objection and permitted said contract to be given in evidence to the jury.

To the action of the court overruling said objection and permitting said contract to be read to the jury the defendant, by its counsel, excepted, and the exception was noted by the justice presiding on his minutes before the jury retired to consider of their verdict; and the defendant, by its counsel, requested the court to sign and seal this its first bill of exceptions, which is accordingly done, *nunc pro tunc*, this the 23d day of February, A. D. 1899.

A. C. BRADLEY, *Justice.* [SEAL.]

Said contract No. 815 was then offered and read to the jury, and is in words and figures following, to wit:

Copy.

Filed Dec. 16, 1896.

No. 815.

This contract, made and concluded this twenty-ninth day of June in the year one thousand eight hundred and eighty-seven by and between the District of Columbia, of the first part and the Camden Iron Works by Walter Wood, president, of the second part, witnesseth:

First. That the said party of the second part has agreed, and by these present does agree with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents, and hereunto annexed, to furnish all necessary labor and materials, and in a good, firm and substantial manner, in strict accordance with the printed specifications, modified in writing, and the general stipulations hereunto attached and made a part of this contract, — furnish and deliver as herein indicated, the following materials, to wit:

9,000 feet, more or less, of twelve-inch cast-iron pipe.
10,000 feet, more or less, of six-inch cast-iron pipe.
10 15,000 feet, more or less, of four-inch cast-iron pipe.
10,000 feet, more or less, of three-inch cast-iron pipe.

Specifications.

Quantity.

The work to be done consists in furnishing and delivering 9,000 feet of 12-inch, 10,000 feet of 6-inch, 15,000 feet of 4-inch, and 10,000 feet of 3-inch cast-iron water pipe; [100,000 pounds of special castings for use in connection therewith. Also, the following water valves: 2, size 20 inches; 10, size 12 inches; 2, size 10 inches; 12, size 6 inches; 12, size 4 inches; 30, size 3 inches all two-way valves; 30 6-inch four-way valves; 5 6-inch five-way valves; 10 6-inch three-way valves].* The quantities are to be considered approximate only, and the Commissioners reserve the right to increase or diminish the orders, not exceeding twenty (20) per cent. of the above amounts. The right is also reserved to award contracts for the whole amount or for any part, as, in the opinion of the Commissioners, may best serve the interest of the Government, and bids for the whole or any part will be considered.

Description.

Straight pipes.—The straight pipes shall be circular cylinders, with concentric inner and outer surfaces, and of such length as to lay at least twelve (12) feet in each section. The bells and spigots must conform strictly with the drawings and specifications to be furnished.

Thickness and weight of pipe.—The thickness of the 12″ pipe shall be $\frac{9}{16}$ of an inch, and the weight of each section 900 pounds; permitted deviation, 3 per cent.

The thickness of the 6″ pipe shall be $\frac{7}{16}$ of an inch, and the weight of each section 360 pounds; permitted deviation, 3½ per cent.

The thickness of the 4″ pipe shall be $\frac{3}{8}$ of an inch, and the weight of each section 216 pounds; permitted deviation, 3½ per cent. The thickness of the 3″ pipe shall be $\frac{5}{16}$ of an inch, and the weight of each section 158 pounds; permitted deviation, 3½ per cent.

For any excess in any section of pipe above the permitted deviation no payment will be made.

The seat or shoulder of the bell and the end of the spigot must be straight and even, so as to make a smooth joint.

No pipe will be accepted whose eccentricity at either bell or spigot end shall exceed one-eighth ($\frac{1}{8}$) of an inch.

Space for lead joint.—All pipes of twelve inches diameter and under are to be formed so as to give a space for lead joint not less than five-sixteenths of an inch all around, nor more than three-eighths.

[* Words and figures enclosed in brackets erased in copy.]

11 All pipes larger than twelve inches diameter shall have space for lead joint not less than three-eighths of an inch and not more than seven-sixteenths. No pipe will be accepted which is defective in space for joint, whether in consequence of eccentricity of form, or otherwise.

Special castings.—All branches, curves, goose-necks, sleeves, and other necessary connecting pieces shall conform in form and dimensions of parts with drawings and instructions of the Engineer Commissioner.

Lugs shall be cast on any or all pipes and special castings as may be shown on drawings or as directed by the Engineer Commissioner.

Patterns.—All patterns are to be furnished by the contractor and be approved by the Engineer Commissioner, or his agent, before castings are made from them.

All tools, materials, labor, and expenses necessary to the proper manufacture, inspection, weighing, and delivery of the pipes and castings shall be furnished by and at the cost of the contractor, excepting only the salary of the inspector to be appointed by the Engineer Commissioner.

Metal.—The metal of which the castings are to be made shall be iron, remelted in a cupola or air furnace, and of such make as shall be approved by the Engineer Commissioner.

It shall be without any admixture of cinder iron or other inferior metal, entirely free from uncombined carbon when seen under the microscope, and shall admit of being easily drilled or cut. The iron in the pipe shall have a tensile strength of at least sixteen thousand (16,000) pounds to the square inch.

Vertical casting.—All pipes shall be cast vertically in flasks of uniform length for each size, with the bell end down, and shall be made in such moulding, sand or loam as will leave the surface in good condition to receive the coal-tar varnish. The 3 and 4 inch pipes may be cast bell end up.

Pipes to be marked.—Every pipe, branch, or other separate casting, shall have cast upon it the initials of the maker's name, the year in which it was cast, and the running number of the castings of the same size and kind; the letters and figures to be cast upon the outside, and not less than two inches in length and one-eighth inch in relief. Duplicate numbers should not be used.

Quality of castings.—All pipes and castings shall be free from scoriæ, sand holes, air bubbles, cold-shut cracks, and other defects or imperfections; shall be truly cylindrical in the bore, straight in the axis, of equal thickness throughout, and internally of the full specified diameters; plugging or filling will not be allowed.

Cleaning.—Every casting must be thoroughly dressed and made entirely clean and free from rust, earth, sand, and dust. Iron wire brushes must be used as well as softer brushes to remove the loose dust. No acid or other biting liquid shall be used in cleaning the castings. No lumps shall be left on the inner surfaces in the barrels or sockets or on the outer surface of the spigot end.

12 Hammer inspection.—All castings, after being cleaned under the direction of the inspector, shall be subjected to a careful and thorough hammer inspection.

Gauges.—The bells and spigots will be tested by suitable gauges

Caliper test.—The thickness of the metal of the pipes and special castings will be tested by calipers. No pipe will be received when the thickness of metal is less by more than one-twelfth ($\frac{1}{12}$) of an inch for the 12-inch pipe, or one-sixteenth ($\frac{1}{16}$) of an inch for the 3, 4, and 6 inch pipe, than the thickness required by the specifications and drawings.

Coating.—Every pipe, branch, and special casting shall be carefully coated inside and out with coal-tar pitch and oil, in accordance with the following rules:

No pipe to be dipped after rust has set in.

The coal-tar pitch to be made from coal-tar, distilled until the naphtha is entirely removed and the material deodorized. It should be distilled until it has about the consistency of wax when cold. The mixture of five or six per cent. of linseed oil is recommended. Pitch which becomes hard and brittle when cold will not answer.

The pipes will be heated in an oven to a temperature of 300 degrees Fahrenheit, and then dipped in the tar pitch and allowed to remain from one to fifteen minutes, according to size and temperature of pipe and condition of tar.

The application must be made to the satisfaction of the Government inspector, and the material and process be subject at all times to his examination, inspection, and approval.

The proper coating will be tough and tenacious when cold on the pipes, and not brittle or with any tendency to scale off. No pipe will be accepted the coating of which, for any reason, is unsatisfactory.

Pressure test.—After dipping, and when dry and cool, the castings will be subjected to a hydrostatic pressure of 300 pounds to the square inch. While under pressure the hammer test shall be applied, and any casting which shows defect by leaking, sweating, or otherwise, will be rejected. If the Engineer Commissioner shall so determine, they shall be subjected to further test after delivery and before final acceptance.

Weight to be marked.—After coating the castings will be weighed in the presence of the inspector, and the weight distinctly marked on the casting with white paint. The contractor shall provide, at the foundry where the pipes and castings are to be manufactured, proper officially sealed scales and weights for weighing the castings.

If the Engineer Commissioner shall so decide, the pipes and castings may be weighed after delivery, and the weights so ascertained shall be used in the final settlement of the account.

No approval by the inspector shall prevent ejection for any defects which may be discovered before the final inspection and acceptance.

13 Final inspection.—The final inspection will be made after the castings have been delivered.

Condemned pipes to be removed.—If any castings shall be condemned as unsuitable under this contract, the said contractor shall forthwith, at his own expense, remove the same, and not again present them for inspection.

The contractor shall place the castings in such position as the inspector may require, and will remove them when required for convenience of inspection.

[Valves.—The valves must be of some standard manufacture, capable of resisting a pressure of 300 lbs. per square inch, and satisfactory in all their details to the Engineer Commissioner. Detail drawings to be submitted with the proposal.]*

Delivery.

All material will be delivered on such wharves in the District of Columbia as may be ordered by the Engineer Commissioner, or on the cars at either railroad depot in the city of Washington. The contractor will send with each shipment a schedule giving the consecutive numbers and weight of each pipe and special casting sent at that time, and of the valves and specials, all to be certified by the inspector.

One-half of each size of straight pipe must be delivered on or before [August 1st,]* September 25, 1887, the remainder on or before [September 15th, 1887]* Nov. 10th, 1887.

[Special castings ordered must be delivered within 30 days of order being given.

The following valves must be delivered on or before August 1, 1887: Two 20″ valves, six 12″ valves, 6 6″ valves, six 4″ valves, fifteen 3″ valves, ten 6″ four-way valves, three 6″ five-way valves, five 6″ three-way valves, and the remainder must be delivered on or before September 15, 1887.]*

In case the deliveries are not made as above specified there will be deducted from the contract prices as herein specified, one per cent. of the contract price for all delinquent articles for each and every week day that they remain delinquent.

Payments.—Payments will be made after August 1st and September 15th for all pipes, valves, and castings received and accepted in proper order and condition and in accordance with these specifications, less twenty (20) per cent. of the amount found due, to be reserved until the satisfactory completion of the contract.

General inspection.—The whole process of the manufacture of the pipes and castings shall be open at all times to the inspection of the Engineer Commissioner, or his authorized agent. Specimen castings of the metal used suitable for a testing machine shall be made when desired by him, and such castings must bear a tensile strain of sixteen thousand (16,000) pounds per square inch.

14 No metal, mould, or core, which, in his opinion, may not be proper for the purpose for which it is intended shall be used. He shall approve or disapprove the process of cleaning and testing the pipes, the preparation and application of the pitch varnish, and, in general, the form, size, uniformity, and condition of all castings. He may reject, without proving, any casting which is not in con-

[* Words and figures enclosed in brackets erased in copy.]

formity with the specifications and drawings. On all questions the decision of the Engineer Commissioner shall be final.

To prevent disputes and litigations, it is expressly understood that the decisions of the Engineer Commissioner shall be final as to the acceptance or rejection of any pipe, casting, or valve delivered, and that he shall decide as to the meaning and intent of these specifications, or any obscurity in the wording of them; and, further, that he shall have the right to correct any errors or omissions in them necessary for the proper fulfillment of their intention; the action of such correction to date from the time that the Engineer Commissioner gives due notice thereof.

The prices bid must cover the entire cost to the District of Columbia for the pipes, casting-, and valves finally accepted under the provisions of these specifications, including freight, wharfage, &c.; and for any extra work or change due to any alteration or correction in said specifications, the fair price to be paid shall be determined by the Engineer Commissioner and stated in writing by him at the time such extra work or change is ordered, otherwise no claim for any payment above the regular contract price will be allowed, nor will any claim for extra work be admitted if such work shall have been done without a written order from the Engineer Commissioner antedating the execution of the same.

Whenever the words Engineer Commissioner are used, they refer as well to his authorized agents limited to the particular duties entrusted to them in writing.

General Conditions, 1887–'8.

1. All loss or damage arising out of the nature of the work to be done, or from any unforeseen or unusual obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, will be sustained by the contractors.

2. Failure to commence the work at the time specified, or to prosecute it thereafter in a satisfactory manner and at a rate of progress necessary, in the opinion of the District Commissioners, for its entire completion within the limits of time fixed by the contract, will be authority for the said Commissioners to suspend the contractors from the work and employ other parties to complete it. All money due the contractors at the date of suspension will be retained until the delivery is completed, and be applied to the payment of any increased cost thereof, and any excess of cost, over and above the amount so retained, will be charged against the contractor and sureties, who will each and severally be held liable therefor.

3. The contractor must be prepared to do any extra work that may, with the approval of the Commissioners of the District, be ordered the Engineer Commissioner arising out of any modification in the plans or details that may appear necessary, and for this he will be paid at the contract rates for work of a similar character, or, if the extra work should be of a class for which no rate is fixed by the contract, the fair price to be paid will be determined by the Engineer Commissioner, but no authority for

extra work will be recognized except the written order of the Engineer Commissioner.

4. Inspectors will be appointed, whose duty it shall be to point out to the contractors any neglect or disregard of the specifications of contracts, but the right of final acceptance or condemnation of the work will not be waived at any time during its progress Contractors will be held responsible for the faithful execution of their contracts; and upon all technical questions concerning the execution of the work, in accordance with the specifications and the measurements thereof, the decision of the Engineer Commissioner of the District of Columbia shall be final.

5. Payments will be made as specified, upon estimates approved by the Engineer Commissioner, less 20 per cent. of each estimate, to be withheld until the final payment, which will only be made upon the certificate of the said Commissioner that the work has been completed and properly executed to the satisfaction of a majority of the Board of Commissioners.

6. Good and sufficient bonds to the United States in a penal sum equal to the estimated amount of the contract, with sureties to be approved by the Commissioners of the District of Columbia, will be required from all contractors, guaranteeing that their contract will be strictly and faithfully performed to the satisfaction of, and acceptance by, said Commissioners.

7. All work must be commenced within — days, and completed within 136 days after the date of the execution of the contract; if not so completed, the pay of all inspectors employed on the work after the time fixed for its completion will be charged against and deducted from any money that may be due or become due the contractor, as well also the sum of ten dollars ($10.00) *per diem* for the same period, estimated as liquidated and fixed damages to the District arising from failure to complete the work at the time specified—time of completion of the contract being an essential element and consideration.

8. Contractors will punctually pay the workmen who shall be employed by them upon the work under their contract, in cash current, and not in what is denominated store pay or orders, and will, from time to time, and as often as may be required by the Commissioners of the District of Columbia, furnish to said Commissioners satisfactory evidence that all persons who have done work or furnished materials have been paid as herein required. And if such evidence is not furnished, such sum or sums as may be necessary for such payment may, in the discretion of the said Commissioners, be retained until such claims shall be fully satisfied.

9. No contract or any interest therein shall be tranferred by the parties to whom the award is made. It is a condition of all
16 contracts that such tranfers will be null and void, and will cause the contract to be annulled and the work to be given to other parties under the conditions mentioned in paragraph 2 of these general conditions.

Second. It is further agreed that the party of the second part shall

receive for furnishing and delivering the aforesaid materials, the following prices, viz:

For the twelve-inch pipe, one $\frac{56}{100}$ (1.56) cents per pound.
For the six-inch pipe, one $\frac{62}{100}$ (1.62) cents per pound.
For the four-inch pipe, one $\frac{66}{100}$ (1.66) cents per pound.
For the three-inch pipe, one $\frac{79}{100}$ (1.79) cents per pound.
Payments to be made in warrants for cash upon the United States Treasury.

In witness whereof, the undersigned, William B. Webb, Samuel E. Wheatley, and William Ludlow, Commissioners of the District of Columbia, appointed under the act of Congress entitled "An act providing a permanent form of government for the District of Columbia," approved June 11, 1878, and the party of the second part to these presents have hereunto set their hands and seals the day and year first above written.

(Signed) WILLIAM B. WEBB, [L. S.]
(Signed) S. E. WHEATLEY, [L. S.]
(Signed) WILLIAM LUDLOW, [L. S.]
Commissioners of the District of Columbia.

[Corporate Seal Camden Iron Works.]

(Signed) WALTER WOOD,
Pres't Camden Iron Works.

Signed and sealed in the presence of—
(Signed) E. H. DIEFFENBACH.

Know all men by these presents that we, The Camden Iron Works, by Walter Wood, president, as principal, and George Wood and Samuel R. C. Mathews, as sureties, of the city of Philadelphia, State of Pennsylvania, are held and firmly bound unto the United States of America in the sum of twenty-three thousand (23,000) dollars, lawful money of the United States of America, to be paid to the said United States; for which payment, well and truly to be made, we and each of us do bind ourselves and each of our heirs, executors, administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this twenty-ninth day of June, A. D. one thousand eight hundred and eighty-seven.

Whereas the above-bounden The Camden Iron Works, by Walter Wood, president, by an instrument in writing under his hand and seal, bearing even date with these presents, has contracted with the District of Columbia to furnish all necessary labor and materials, and in a good, firm, and substantial manner, in strict accordance with the terms, specifications, and general stipulations of the foregoing contract, furnish and deliver the following-named material, to wit:

17 9,000 feet, more or less, of twelve-inch cast-iron pipe;
10,000 feet, more or less, of six-inch cast-iron pipe;

15,000 feet, more or less, of four-inch cast-iron pipe;
10,000 feet, more or less, of three-inch cast-iron pipe; and

Approved:
(Signed) WILLIAM B. WEBB,
(Signed) S. E. WHEATLEY,
(Signed) WILLIAM LUDLOW,
Commissioners, D. C.

on the conditions and for the considerations in the aforesaid contract mentioned and contained or referred to therein:

Now, therefore, the conditions of the obligation are such that if the said The Camden Iron Works, by Walter Wood, president, shall strictly and faithfully perform, to the satisfaction and acceptance of the Commissioners of the District of Columbia, the work to be done by the Camden Iron Works, by Walter Wood, president, in accordance with the stipulations of said contract, and in every respect fully comply with the provisions and requirements therein contained, then this obligation to be void; otherwise to remain in full force and virtue.

CAMDEN IRON WORKS. [L. S.]
(Signed) WALTER WOOD, *Pres't.* [L. S.]
(Signed) GEORGE WOOD. [L. S.]
(Signed) SAMUEL R. C. MATHEWS. [L. S.]

Signed and sealed in the presence of—
(Signed) E. H. DIEFFENBACH.

Bondsmen's Oath.

STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

I, George Wood, being duly affirmed, depose and say that I reside in the city of Philadelphia, State of Pennsylvania; that I am a freeholder therein, and that the value of my real estate, over and above all debts and liabilities, is over twenty-three thousand dollars ($23,000), and that I am fully responsible for the amount of my obligation in the foregoing bond by me executed.

(Signed) GEORGE WOOD.

Affirmed and subscribed this 29th day of June, 1887, before me—

JAMES CROWE,
Notary Public.

18 STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

I, Sam'l R. C. Mathews, being duly affirmed, depose and say that I reside in the city of Philadelphia, in the State of Pennsylvania, and that the value of my property, over and above all debts and liabilities, is over twenty-three thousand dollars ($23,000), and that

I am fully responsible for the amount of my obligation in the foregoing bond by me executed.

(Signed) SAMUEL R. C. MATHEWS.

Affirmed and subscribed this 29th day of June, 1887, before me—

(Signed) JAMES CROWE.

That after signing and sealing said first bill of exceptions, hereby made part hereof, to further maintain the issues on its part joined, the plaintiff further examined the witness TINDALL, who testified, in continuance of his direct examination, that after the office of secretary to the governor of the District of Columbia was abolished, in 1874, no action was taken by the temporary Board of Commissioners, appointed under the act of Congress approved June 20, 1874, looking to the adoption of a corporate seal for the District, and none by the permanent board, approved by the act of Congress of June 11, 1878, until September 23, 1887, when the Board of Commissioners, consisting of William B. Webb, Samuel E. Wheatley, and William Ludlow, passed an order that the seal of the District of Columbia, as adopted by an act of the Legislative Assembly of August 3, 1871, be placed in the official charge and custody of the secretary of the Board of Commissioners of the District of Columbia. Under said act of assembly the secretary to the governor of the District of Columbia was made the custodian of the seal, and after this office was abolished by the act of June 20, 1874, the seal had remained in the custody of the District Commissioners.

On cross-examination the witness further testified that this seal was not generally used until after the contract heretofore offered in evidence in this cause had been entered into by the parties thereto, but was affixed to deeds conveying real estate of the District and bonds and securities of the District, and in some cases to tax deeds issued by it.

And thereupon the plaintiff further gave evidence by one ALEXANDER MCKENZIE, who testified on direct examination that he was the principal accounting clerk in the office of the auditor of the District and had been for fifteen years; that the total amount of iron pipe of all kinds delivered to and received by the District from the Camden iron works under said contract No. 815 was 1,025,943 pounds, as follows:

19

Nov. 18, 1887.	4″ pipe	22,457 lbs.
	6″	94,525
	12″	194,109
Dec. 24,	3″	33,962
	4″	141,909
	6″	54,230
	12″	108,123
Jan. 6, 1888.	12″	109,847
Jan. 17,	12″	56,309

And thereupon counsel for the plaintiff asked the said McKenzie: Was there not some pipe received later than that? Did you read the item that was delivered on the 27th day of February, 1888?

To which question, at the time the same was asked and before it was answered, counsel for the defendant objected, upon the ground that it was an attempt to prove performance of the contract after the time limited therein had expired, and that no recovery could be had under the contract offered in evidence for such pipe; but the presiding justice overruled said objection and permitted said question to be answered.

To the action of the court in overruling said objection and allowing said question to be answered the defendant, by its counsel, excepted, and the exception was noted by the justice presiding on his minutes before the jury retired to consider of their verdict; and the defendant, by its counsel, requested the court to sign and seal this its second bill of exceptions, which is accordingly done, *nunc pro tunc*, this the 23d day of February, A. D. 1899.

A. C. BRADLEY, *Justice.* [SEAL.]

Whereupon the witness answered that 210,472 pounds of pipe were received and accepted by the District of Columbia on the 27th day of February, 1888; that the value of all pipe furnished by the plaintiff at contract rates was $16,335.87, on which there was paid in cash $5,291.71; the balance, or $11,044.16, was charged as fines and penalties for not delivering the pipe within the time specified in the contract.

The witness thereupon produced a statement of the account as made up in the office of the District auditor, and in reply to a question of plaintiff's counsel stated that the account showed that against the consignment of pipe received by the District on the 27th day of February, 1888, worth at contract rates $3,283.36, there was a charge of 89 % as for delay for that number of days in delivery, amounting to $2,922.19, and a *per diem* penalty at $10 a day, or $890, besides. Other fines were charged under the one per cent. per day penalty clause of the contract, ranging from 85 to 16 % of the value of the several consignments. These charges were predicated upon the theory that the contract took effect from its date.

20 Thereupon the plaintiff further gave evidence by WALTER WOOD, who testified on direct examination that he was the president of the plaintiff company, and that he had signed the contract offered in evidence as such president; that the business of the plaintiff corporation was and is the manufacture of iron castings and water pipes; that he has had thirty years' experience in the manufacture of such pipe, having started as a workman in the foundry; that the foundry at Millville has as good facilities as any in the country and had at the time the contract was signed; that from 200 to 250 men are there employed.

Whereupon counsel for the plaintiff asked the witness the following question:

When was that contract (contract No. 815) signed and acknowledged by you?

To which question, at the time the same was asked and before the witness answered it, counsel for the defendant objected, upon the ground that, the court having ruled said contract was a specialty, parol evidence was not admissible to show that the contract was executed on a different day from that recited therein; but the justice presiding overrules said objection and permitted the witness to answer the question.

To the action of the court in overruling said objection and allowing said witness to answer the question the defendant, by its counsel, excepted, and the exception was noted by the justice presiding on his minutes before the jury retired to consider of their verdict; and the defendant, by its counsel, requested the court to sign and seal this its third bill of exceptions, which is accordingly done, *nunc pro tunc*, this 23d day of February, A. D. 1899.

A. C. BRADLEY, *Justice.* [SEAL.]

Whereupon the witness further testified that he signed and acknowledged the said contract as president of the plaintiff company on the 29th day of June, A. D. 1887, and forwarded it the same day by mail to the District Commissioners, at Washington. At this time the contract had not been signed by the District Commissioners.

Whereupon, to further maintain the issues on its part joined, counsel for the plaintiff offered in evidence the correspondence between the parties, without objection, as follows:

WASHINGTON, *June 16th*, 1887.

Camden Iron Works, 400 Chestnut St., Philadelphia, Pa.

GENTLEMEN: I am instructed by the Commissioners D. C. to transmit herewith contract (in triplicate) awarded you for furnishing the District of Columbia with the following amount of water pipe, viz:

21 9,000 ft. 12″ pipe,
10,000 " 6″ "
15,000 " 4″ "
10,000 " 3″ " more or less—

under your proposal submitted on the 10th inst. for execution on the part of your company.

The contract and accompanying bond will be signed as indicated thereon in pencil. There must be two or more sureties, who must not be officers of the company. The sureties should qualify on the blanks attached before a notary public or clerk of court of record. If before a notary public, his appointment shall be certified to by the clerk of the court.

Upon the execution of the contracts as herein indicated you are requested to return the same to this office for execution on the part of the Commissioners.

Very respectfully,

EUGENE GRIFFIN,
Captain of Engineers, U. S. A.

JUNE 22ND, 1887.

William Ludlow, eng., water commissioners, Washington, D. C.

DEAR SIR: Yours enclosing the copies of contract came duly to hand. Your request that the bondsmen should not be of the officers of the company has compelled us to wait until Mr. George Wood, who was on our bond previously for Washington, should return to the city. We write this so that you may understand the apparent delay in returning you the contract.

In the matter of deliveries, to which we have alluded previously in our letters, would say that it will be impossible for us to carry them out in the manner you suggest any earlier than the 15th of September and the 1st of Nov. If it could be worded differently, other dates could be inserted in their stead, the trouble being that you have asked one-half of each size to be delivered by the dates that go into the contract. We can give you the 12″ earlier, but of 3, 4, and 6's we have heavy engagements, having taken just at the time of your letting several contracts.

We have recently been making some changes in our mode of manufacture of 3″ pipe, which is not in accordance with the wording of the specifications. We do not mean to intimate that you alter the specifications on this account, as we can make the pipe as you ask for, but if changed we can give you better delivery and better pipe. Suppose we send you a sample of what we are making and let you see it. If it meets your approbation, we can arrange earlier times for you than otherwise would be the case.

Yours very truly,

WA-TER WOOD
Pres't Camden Iron Wo.
M. H.

(Dictated.)

22

WASHINGTON, *June 25th*, 1887.

To the Camden Iron Works, 400 Chestnut St., Philadelphia, Pa.:

I am instructed by Col. Ludlow to inform you that no modifications will be permitted in regard to the contract for water pipe. It is requested that you will return contract properly completed at the earliest date possible.

Very respectfully,

THOMAS W. SYMONS,
Capt. of Eng.

JUNE 29TH, 1887.

Thomas W. Symons, capt. of eng., water commissioners, Washington, D. C.

DEAR SIR: We had yours of June 25th duly at hand, and since its receipt have had the contracts and bonds signed and acknowledged and send them by this mail.

The modification we suggested in the matter of 3″ pipe we do not desire to press upon you department. We would, however, ask that you have the weights and thicknesses of the pipes set down in the contract examined. According to our figures there is some

discrepancy between the stated thickness and the weights named, especially in the 3″. All our figuring has been based upon the weights that are given.

We would have been glad to have been able to have met your wishes in the matter of delivery, but what it is impossible to do, of course, one cannot contract to carry out. As we wrote you in our previous letter, we, unfortunately for ourselves, had a large number of offers for piping accepted during the time that you held our bid in your hands for acceptance. This will make it impossible for us to observe the deliveries originally asked for, and which we could have done at the time when the offer was made.

We have made these changes in the contract. We are,

Yours very truly, WALTER WOOD,
Pres. C. I. W.

Dictated.
Enclosures.

JUNE 29TH, 1887.

Washington Water Supply Co., Washington, D. C.

GENTLEMEN: Please send us blank specifications covering the contract which you have recently awarded us.

Very truly, R. D. WOOD AND CO.,
Per B. A. KNIGHT.

WASHINGTON, *June 30th*, 1887.

Messrs. R. D. Wood & Co., Phila., Pa.

GENTLEMEN: In reply to your communication of June 29th, blank forms of proposals and specifications for furnishing cast-iron water pipes, castings, etc., for the water department, D. C., are herewith enclosed.

Very truly, JNO. J. BEALL,
Chief Clerk W. D.

23 WASHINGTON, D. C., *July 9th*, 1887.

To the Camden Iron Works, 400 Chestnut St., Phila., Pa.

GENTLEMEN: Will you please inform us when you will be ready for inspection on pipe for use of the District of Columbia?

Very respectfully, T. W. SYMONS,
Captain of Engineers, U. S. A.

PHILA., *7th Mo., 12th*, 1887.

Col. Wm. Ludlow, Eng. Comm., Washington, D. C.

DEAR SIR: We sent you some days since contracts executed in triplicate, but have not yet received our copy. Please let us have it by return mail; also the $4,000 check which we deposited with you with proposal. As our payments are very heavy at present, your attention by return mail will oblige,

Yours truly, CAMDEN IRON WORKS.
WM. E. NEWHALL, *Treas.*

WASHINGTON, *July* 13, 1887.

W. E. Newhall, Esq., treas. Camden iron works, 400 Chestnut St., Phila., Pa.

SIR: In reply to your letter of 7th inst., just to hand, I transmit herewith your certificate of deposit for $4,000.00 on Philadelphia national bank, heretofore enclosed with your proposal for furnishing cast-iron water pipe. Please acknowledge.

Very respectfully, JOSEPH C. ROCK,
Chief Clerk.

PHILA., *7th Mo.*, 14*th*, 1887.

Joseph C. Rock, Esq., chief clerk, District of Columbia, Washington, D. C.

DEAR SIR: Yours of 15th inst. at hand, with enclosure, certificate of deposit returned. Accept thanks.

Yours truly, R. D. WOOD AND CO.
PERROT.

PHILA., *7th Mo.*, 21*st*, 1887.

Col. William Ludlow, Eng. Comm., Washington, D. C.

DEAR SIR: We have been looking daily to receive from you our copy of the contract with you for furnishing pipe. We shall be ready to start making them very soon, but, of course, cannot do so until we have the proper papers. Please let us have it by return mail, and oblige,

Yours very truly, CAMDEN IRON WORKS,
Per J. M. H.

PHILA., 8*th Mo.*, 4*th*, 1887.

Col. William Ludlow, Comm., Washington, D. C.

DEAR SIR: We shall be ready to have you send us an inspector for your pipe on about Aug. 12th; will advise you later
24 as to exact date, and write this in accordance with your request that we let you know when we are ready. Once or twice in the past you have sent as your representative a Mr. Hoyt. If it is your desire that he should go to the foundry again it will be essential to have the dates of delivery that are in the contract waived, as we cannot guarantee them should he have charge of passing the pipe.

We are, yours, WALTER WOOD, *President.*

WASHINGTON, *Aug.* 15*th*, 1887.

Camden Iron Works, 400 Chestnut St., Phila., Pa.

SIRS: In reply to your- of Aug. 4th, I have the honor to inform you that Mr. W. J. Hoyt has been appointed inspector of pipe to be furnished by you. I have never known that Mr. Hoyt neglected his duties or insisted on anything more than was necessary to cause a fulfillment of contract and specifications. His appointment as

inspector will not be considered a sufficient reason for waiving dates of delivery as specified in your contract.

By order of Engineer Commissioner:

T. W. SYMONS,
Capt. of Engineers.

PHILA., *8th Mo.*, 13*th*, 1887.

Col. Wm. Ludlow, water commissioners, Washington, D. C.

DEAR SIR: We have word from our Millville foundry this morning that your pipe will be on their skids on Tuesday. We write this because we have not heard of the arrival of an inspector. If none arrives by the time the pipe are cast, please advise as what you wish done with them, whether we shall keep the pipe waiting for his arrival or have them inspected and tested in our regular way.

We are, yours, WALTER WOOD, *Prst.*

PHILA., *8th Mo.*, 16*th*, 1887.

Capt. T. W. Symons, ass't to Eng. Comm., water works, Washington, D. C.

5

DEAR SIR: Yours of the 18th instant is at hand, speaking of the appointment of Mr. Hoyt as inspector at our foundry.

It would probably have been better for us to have written more fully in our previous letter to you on this subject, for we must have a full understanding before Mr. Hoyt takes up the work. We do not wish to be understood as objecting to Mr. Hoyt as a man, but his examination of castings lacks proper discrimination, and to such an extent as to be unjust. We are not at the present objecting to even such an inspection as this; but as it will entail so great a delay in securing the number of pipe that you desire, you can readily see that the appointment of one who prolongs the time of manufacture in this way makes it essential to change the date of completion. We believe this will make it clear to you that
25 we are not objecting to any inspection because it may be over-exacting, but only that if it is the preference of your department to have such an examination made, time must be given us in which to make the castings. This being the reason of our request, and as we are willing to meet any criticism your department wishes to put upon the pipes, we cannot presume you will hesitate to grant that which it entails. Did we suppose that it would have been otherwise we would have refrained from bidding for the work.

The pipe are now being cast at our Millville foundry, and awaiting your reply, we are,

Very truly yours, WALTER WOOD, *Pres'd't.*

PHILA., *8th Mo.*, 30*th*, 1887.

T. W. Symons, eng., water department, Washington, D. C.

DEAR SIR: We are without advices from you since our correspondence in the matter of the inspector, and it has occurred to us

that perhaps you may have thought we were not casting your pipe. We have, however, kept our gangs on your work so as to complete it within the regular time. The pipe has all been carefully examined, tested, etc., and is ready to go forward to you, if you wish it sent in the absence of your inspector. Iy you desire otherwise, we can utilize it for different orders and remake it when you wish.

Please advise us and oblige,

Yours very truly, CAMDEN IRON WORKS,
Per J. M. H.

WASHINGTON, *Sept. 2nd*, 1887.

Camden Iron Works, 400 Chestnut St., Phila., Pa.

SIRS: Your letter of Aug. 30th is a surprise to me, and I am at a loss to understand it. I wrote you Aug. 15th that Mr. Hoyt was appointed inspector, and he informs me that he has been at foundry daily ready and anxious to inspect pipes under your contract with this city, and has repeatedly urged the prosecution of the work to your sup't at the works, who has stated to Mr. Hoyt that he has no orders to do the Washington work. In the face of these facts your remark that "it is ready to go forward to you, if you wish it sent in the absence of your inspector," &c., is deemed quite remarkable. We are very desirous of having the pipe as soon as possible. Mr. Hoyt is at your foundry to inspect it, and if it is not delivered in accordance with the terms of your contract it would seem that you and you alone are responsible for the delay.

Very respectfully, your obedient servant,

T. W. SYMONS,
Capt. of En.

PHILA., *September 6th*, 1887.

T. W. Symons, eng., water commissioners, Washington, D. C.

DEAR SIR: Yours of September 2nd is before us on the return of the writer from an absence of two or three days.

After ours of the 30th had gone we noticed that the type-
26 writer had the phrase intended to read "in the absence of your inspection" changed by the last word, reading "inspector." We knew of Mr. Hoyt's being in Millville, and hence could not have used the phrase as written.

Your work has been steadily progressing in our foundries since we notified you by letter of our starting, but as no one has taken Mr. Hoyt's place and no arrangement has been made for him to examine the pipe they have not had your inspection, and hence we wrote asking what was your pleasure about forwarding. We have kept them in work, as we wished to complete them as per contract. Please advise us what you wish done.

Let us refer again here to what we said about Mr. Hoyt in our previous letter. We do not object to his examining the pipe, provided it is understood between us that if his examination delays delivery we will not be accountable for such delay. It is not our desire to speak unkindly about him, and what we said in our pre-

vious letter we think sufficient to explain why we made the claim. He is not a proper man for the position.

Awaiting advices of your wishes in the matter, we are,

Yours truly, WALTER WOOD,
Pres't C. I. W.

WASHINGTON, *Sept. 7th*, 1887.

Camden Iron Works, 400 Chestnut St., Phila., Pa.

SIRS: In answer to yours of Sept. 6th, I have the honor to inform you that what this office desires is that the pipe ordered should be inspected and delivered here in accordance with the terms of your contract. Our inspector, Mr. Hoyt, has been at your works daily, duly authorized to make the necessary and proper inspection. He has been directed to make every proper concession consistent with securing good work and materials, and I am not aware of any good and sufficient reason why he should be objected to.

It is desired that it should be distinctly understood that Mr. Hoyt's examination will not be considered as releasing you from accountability for delays in delivery beyond the contract time, unless it is shown that the delay is caused by misconduct or negligence on the part of Mr. Hoyt.

In this connection it may be well to invite your attention to the fact that for three weeks and more he has been at your foundry and has not been permitted to exercise his functions as inspector.

Very respectfully, your ob'd't srvt.,

T. W. SYMONS,
Capt. of Eng.

PHILA., *9th Mo.*, 16*th*, 1887.

Capt. T. W. Symons, water works, Washington, D. C.

DEAR SIR: Yours of the 7th inst. came duly before the writer on his return from an absence, which, together with the con-
27 fusion incident to the celebration now going on in the city, has caused the delay in replying.

We note that you do not wish the pipe already made for you sent to Washington, hence will not do so, and have stopped making them.

It has been unfortunate that you- appointee was a man who has not the entrée of our foundry, and we desire to disclaim here what we fear, from something Mr. Newhall told us on his return, you have understood from our letters, namely, that by what we said we were endeavoring to dictate the appointment of your inspectors. This would be for us as inappropriate and improper as for yourselves to look for us to admit into our shops a man whom we consider unfit. In the matter of inspectors, the real position is, we apprehend, this: that the selection rests with yourselves and the acceptance with us much in the same way as a government sends its accredited agents to other people who, if they have reason for declining such representatives, protect their position by not recognizing them. We do not know that it is worth while to present the grounds in detail of our present action, as we waived them in favor

of Mr. Hoyt in this case because we felt his appointment might have been made for particular reasons, and it has been our endeavor to avoid going into an account of facts that might only lead to contention.

We further desire to disclaim any wish to have the severity of your inspection of our pipe lessened in the slightest degree. Such has not been on our minds and we believe we have so written you.

We note, also, what you say regarding the instructions you have given Mr. Hoyt, and that you state that such delays as come from himself will not count in estimating the time of delivery. This is the gist of our request, as we asked for such extension of time as his appointment might occasion.

There is one point further to be understood in this connection, namely, as to the resumption of work, for if we undertake to remake the pipes as you wish the first delivery cannot be made according to contract. Will this be satisfactory to you? We can arrange to put the pipe in work upon receipt of your answer.

Mr. Newhall reports that you asked him to have us put in writing what we proposed in the matter of the 3″ pipe. The suggestion was made by us not from considerations of the cost of manufacture, but only for mechanical reasons. You will recall the old method of casting pipe on an incline, and that it was given up because the arbor of the core being hollow it had a tendency to float in the molten metal, just as a vessel does on the water. Thus the pipe was thin on one side and thicker on the other. To obviate this, upright casting was adopted, which centered the spindle more perfectly, the arbor having sufficient stiffness from its diameter to withstand the strain caused by the downward flow of the metal, but when we come to the smaller-sized pipe, like 2″, 3″, and 4″ (the last-named size is about the dividing line), the matter is difficult, as these arbors have not sufficient diameter to keep them rigid. For 3″ pipe it has been the custom to have the arbors cast solid,
28 so that while they have no tendency to float in inclined work, yet, being so slender, they are very limber and easily deflected by the flow of the metal. The best pipe of this size, therefore, is made in that character of moulding which permits of the core being steadied at one or more points along its length. This is the method we are using and suggested to yourselves for your consideration, although we make pipes in the same way as your specifications calls for; but the superiority of the other method is so generally acknowledged that we have not this year had a single request for 3″ pipe to be cast differently; hence we felt it our duty to call the matter to your attention.

Awaiting your reply, we are,
Yours very truly,

WALTER WOOD, *President.*

Telegram.

WASHINGTON, *Sept. 28th*, 1887.

Camden Iron Works, 400 Chestnut St., Phila.:

Having failed to furnish the pipe due under your contract on Sept. 25th, there have been ordered from other parties five thousand feet six-inch, six thousand feet four-inch, and five thousand feet three-inch. The Commissioner- desire to know immediately if it is your intention to furnish the remaining pipe contracted for in accordance with the terms of your contract.

SYMONS.

Telegram.

PHILA., *9th Mo.*, 28*th*, 1887.

T. W. Symons, water works, Washington, D. C.:

Your telegram received. We have never declined to make your pipe and are entirely ready to proceed. We have not yet received answer ours sixteenth.

CAMDEN IRON WORKS.

Telegram.

WASHINGTON, *Sept. 28th*, 1887.

Camden Iron Works, 400 Chestnut St., Phila.:

You have failed, not declined, to deliver certain pipe by Sept. 25th, as required by your contract, and the work has been ordered from other establishments. The Commissioners wish to know if you propose to deliver the remainder according to your contract. If not it will be bought in open market and charged to your account as the former part.

SYMONS.

PHILA., 10*th Mo.*, 1*st*, 1887.

Capt. T. W. Symons, water dep't, Washington, D. C.

DEAR SIR: Your telegram of the 23d ult. was delivered after our Mr. Wood had gone out of town, and press of business since his return has prevented an earlier reply.

29 As you say in your dispatch, we have not declined to make the pipe as named in the contract, for in fact we have advised you from time to time that the pipe was in work, and we have made a large tonnage of it.

The only thing preventing the delivery, which is the point at which you say we have failed, has been your instructions to us not to ship what we had made, as it had not been inspected by your Mr. Hoyt; else the pipe would have been in your hands some time since. All the pipe made was carefully and thoroughly examined for defects and tested as called for by the contract. What has been wanted was Mr. Hoyt's supervision, and we do not claim that, lacking this, we were entitled to send you the pipe, but wished by

making it to show our willingness and ability to furnish the castings as contracted for. The position we have taken in the matter of the inspection was not assumed hastily, but only after careful consideration, and (as we told your Mr. Ludlow) we are willing to bear the consequences, should we be proved wrong, for what which we have done.

There is no desire of avoidance of anything on our part. We have, however, sought by the correspondence that has passed between us to find a common ground upon which we could meet the wishes of the department that Mr. Hoyt only should have the supervision of the work, and we thought it had been reached in the last letters that have passed between us.

To reply directly to your query, we would say that we are ready to put your pipe in work and have them in Washington in every way as called for by the contract, except that from the lapse of time it will not be possible for us now to deliver the first portion in the time specified.

Your advise us that you have purchased some pipe, and it therefore becomes necessary for us to say that we cannot admit your right to charge such purchases to our account when we have always stood ready to make and have actually made that which you wanted, the only hindrance to the delivery coming from your selection of Mr. Hoyt, about the choice of whom we wrote you at the beginning when we asked for an inspector to be sent us.

We shall certainly regret if our willingness to go as far as is possible for one respecting his own position and rights shall only lead to further differences of views, and we desire to impress upon you that what we have done has not been from a factious spirit.

If you think that this can be made clear by a personal interview, it will give us pleasure to call upon you.

Awaiting your reply, we are yours very truly,

WALTER WOOD,
Pres'd't C. I. W.

Telegram.

WASHINGTON, *Oct. 4th*, 1887.

R. D. Wood and Co., 400 Chestnut St., Phila.:

Letter of Oct. 1st received. The simple point of which positive assurance is required is, Do you propose to deliver the balance of the pipe under the provisions of your contract, including inspection by the duly authorized inspector? Please answer at once and definitely.

T. *M.* SYMONS.

PHILA., 10*th Mo.*, 5*th*, 1887.

T. W. Symons, water dept., Washington, D. C.

DEAR SIR: Your dispatch of the 4th came duly to hand. We do not see how we can possibly put a reply to your query in a clearer or more categorical way than we did in the 3d clause of the 2nd

page in our letter of the 1st inst. We think when you refer to it again you will agree with us.

The question of the inspection we thought had been thoroughly discussed and a conclusion reached, to which we all assented, as in yours of the 7th ult. and our conversation with Mr. Ludlow when he was in this office.

The writer had hoped to have been able to have gotten off to Washington today or tomorrow, but fears, from the present outlook, it will be impossible to do it at that time, though we would make an especial effort if you so desired it.

Yours truly, WALTER WOOD, *Pres'd't.*

Telegram.

WASHINGTON, *October 6th*, 1887.

Camden Iron Works, 400 Chestnut St., Phila., Pa.:

Yours received. Our inspector, Hoyt, will return to your foundry to inspect pipe in a few days. The Commissioners would like to be assured that this — acceptable and that the work will proceed without delay.

THOS. W. SYMONS,
Ass't to Eng. Comm.

PHILA., 10*th Mo.*, 8*th*, 1887.

T. W. Symons, water works, Washington, D. C.

DEAR SIR: Your telegram of the 6th came duly to hand, and we have instructed the foundry, on the arrival of the inspector, to put the pipe in work. Please let us know what day he will arrive, so that, if possible, we may prepare for his coming.

You have not yet written us what you wish done in the matter of the 3″ pipe, whether you wish us to carry out the suggestion we made or not. We believe we explained that the alternative was prompted not on account of cost of manufacture, but because of mechanical reasons in making a better pipe.

Yours very truly, WALTER WOOD, *Pres'd.*

WASHINGTON, *Oct.* 10*th*, 1887.

Camden Iron Works, 400 Chestnut St., Philadelphia.

GENTLEMEN: Your favor of the 8th inst. is at hand. Our inspector has been telegraphed to and will be at your works
31 very soon, but until I hear from him I cannot tell exact date. I think, however, that you may expect him by Wednesday, the 11th.

The Engineer Comissioner declines at present to consider favorably your proposition for a change in the method of casting 3″ pipe. He would like to have the matter investigated more before authorizing the change.

Very respectfully, T. W. SYMONS,
Capt. of Eng.

PHILA., 10*th* *Mo.*, 11*th*, 1887.

T. W. Symons, water works, Washington, D. C.

DEAR SIR: We have yours of October 10th, saying that you look forward to the inspector reaching us on Wednesday, the 12th.

In the matter of the 3″ pipe, in which you say you would like to have the matter investigated more before authorizing the change, would say that we hold ourselves ready to do anything you suggest in the matter. We will await your reply before taking any steps, and shall be pleased to assist you in the investigation in any way that you wish. We can send a sample of the casting to you at Washington, or we should be pleased to explain it to any one familiar with such work whom you may see fit to send, but if you prefer the matter can be passed entirely by. We only spoke of it because we felt it was proper to call your attention to it.

Awaiting your reply, very truly yours,

WALTER WOOD, *Pres'd't.*

WASHINGTON, *Oct.* 12*th*, 1887.

Camden Iron Works, 400 Chestnut St., Phila.:

I find that it will be impossible for our inspector to be at Millville before Monday morning next, at which time he telegraphs me he will be on hand. Perhaps it will be as well under the circumstances to pass by the question of a change in the method of making the 3″. If I can get away I will come over perhaps next week, and possibly then the change may be authorized.

Very respectfully,

T. W. SYMONS,
Capt. of Eng.

PHILA., 10*th* *Mo.*, 13*th*, 1887.

T. W. Symons, water works, Washington, D. C.

DEAR SIR: Yours of Oct. 10th is duly at hand. We note its contents, and will gladly await your arrival regarding the 3″ pipe.

We further note that the inspector will reach us on Monday.

Yours very truly,

WALTER WOOD, *President.*

WASHINGTON, *Nov.* 1*st*, 1887.

To the Camden Iron Works, 400 Chestnut St., Phila., Pa.

SIRS: I have to call your attention to the fact that this is the last day of your contract time, and as yet no pipe has been received from you. Subtracting the amount of pipe purchased in open market leaves the following amounts to be furnished under your contract: 9,000′ 12″, 5,000′ 6″, 9,000′ 4″, and 6,700′ 3″. It is hoped that this pipe, especially the smaller sizes, will be received very shortly.

32

The Commissioners decline to consider the change proposed in method of making 3″ pipe, so it will be required to be made in accordance with the contract specifications.

Very respectfully, yours, &c.,

T. W. SYMONS,
Capt. of Eng.

PHILA., 11*th Mo.*, 3*d*, 1887.

T. W. Symons, water supply, Washington, D. C.

DEAR SIR: We have yours of Nov. 1st duly at hand, and note that you have reached a decision regarding the 3″ pipe, namely, to have it cast as originally desired. We will therefore have it taken in hand at once and proceeded with.

The other points in your letter have been covered by our preceding correspondence.

Very truly yours, WALTER WOOD, *President.*

Telegram.

WASHINGTON, *Nov.* 30*th*, 1887.

Camden Iron Works, 400 Chestnut St., Phila, Pa.:

Will you consent to cancellation of order for remaining 12″ pipe?

T. W. SYMONS.

Telegram.

PHILA., 11*th Mo.*, 30*th*, 1887.

T. W. Symons, water dep't, Washington, D. C.:

Shall be glad to accommodate Government, if possible; but let us have further details.

R. D. WOOD AND CO.

PHILA., 11*th Mo.*, 30*th*, 1887.

T. W. Symons, eng., water works, Washington, D. C.

DEAR SIR: Your dispatch of this morning is at hand, asking if we will consent to the cancellation of the remaining 12″ pipes we have not yet made for you. It is always our rule to oblige our customers so far as we can in such matters. In the last two or three weeks the price of pipe, like everything else in the iron trade, has decreased largely, and hence there would be a considerable loss to us in complying with your request. Of this, however, we will make no account and will cancel the order for the remaining 12″ yet unmade, it being understood that all the pipes we have cast shall be taken and paid for at the regular contract price, without any deduction.

We say this not because we know of any charges you have
33 against us, but in one of your dispatches of a month ago or so you mentioned something of that kind, and in our assuming the disadvantage of the cancelling of the 12″ pipe let it be understood that the disadvantage of anything early in the fall is to be borne by the department.

Yours very truly, WALTER WOOD, *President*,
Per M. H.

(Nov. 30.)*

WASHINGTON, ——, 1887.

Camden Iron Works, 400 Chestnut St., Phila.

GENTLEMEN: Your telegram received. Our appropriation for the water dep't *are* in such a state that we could not lay the 12″ pipe if it was received. That being the case, I would prefer not to expend money for the pipe until next appropriation by Congress is available. I have not laid the matter before the Commissioners, as I would like your assurance of your willingness to consider the order for the remainder of the 12″ pipe revoked, if such willingness on your part exists.

The question of available funds is the only and sole question involved.

An early reply would very much oblige me.

Very respectfully, your obdt. srvt.,

T. W. SYMONS,
Capt. of Eng.

PHILA., 12*th Mo.*, 1*st*, 1887.

T. W. Symons, eng., water works, Washington, D. C.

DEAR SIR: We have yours of blank date this morning, and the suggestion you make of the shortness of the appropriation is one we often have to face. We can readily arrange to accommodate you by letting the account be paid out of next year's appropriation, sending you the pipe to be put to such use in the meanwhile as you desire.

It always gives us pleasure to accommodate our friends in such thing as this, and as soon as we have word from you will stop casting any more pipes, as per our letter of yesterday, if such is your wish. You can readily see, however, that those which are made, being cast according to your designs, we would desire to have taken off our hands, as almost all engineers have particular wishes regarding drawings, e-c.

Yours very truly, WALTER WOOD, *President.*

Telegram.

WASHINGTON, 12*th Mo.*, 2*nd*, 1887.

Camden Iron Works, 400 Chestnut St., Phila.:

Only pipe now manufactured will be received under your
34 contract all further work on pipe for this city to cease letter by mail by order Engineer Commissioner.

T. W. SYMONS.

[* In pencil in copy.]

WASHINGTON, *Dec. 2nd*, 1887.

To the Camden Iron Works, 400 Chestnut St., Phila.:

In furtherance of my telegram of this date, I have the honor to inform you that the Engineer Commissioner orders that only the pipe now manufactured under your contract be received, and that the order for the pipe designated in my letter of Nov. 1st, 1887, in so much as it refers to the pipe yet unmade, be cancelled. You are therefore requested to cease work on pipe for Washington and to send on and deliver the pipe which is now made and accepted by our inspector.

Very respectfully, T. W. SYMONS,
Capt. of Eng.

PHILA., *12th Mo., 5th*, 1887.

T. W. Symons, eng., water works, Washington, D. C.

DEAR SIR: We have stopped casting your pipe as per your request of December 2nd.

Yours very truly, WALTER WOOD, *President.*

And thereupon the witness further testified, upon direct examination, that a copy of the contract was not returned by the District Commissioners as requested in plaintiff's letter of July 21, nor was it received by the plaintiff until the 4th day of August, though whether it had come by mail or whether the plaintiff sent a messenger to Washington for it the witness could not recall; but when received on the 4th day of August it was not signed by William B. Webb, one of the Commissioners of the District, a fact which witness did not consider at the time as being of any importance.

The copy of the contract so received by the plaintiff was thereupon offered in evidence. It was identical with that produced by the witness Tindall, except that it did not have the signature of William B. Webb.

That immediately upon receipt of this contract the plaintiff company made ready to cast the pipe required by it. A large quantity was manufactured during the month of August and was ready for inspection; but after the correspondence about the unfitness of Hoyt to act as inspector and after the receipt of the letter from Captain Symons, of date September 7, 1887, insisting that Hoyt should inspect and pass upon the pipe, which the plaintiff refused to permit, the plaintiff stopped work on the Washington pipe and sold to other parties what had already been manufactured. The witness stated that he had known Hoyt before, and that, in his opinion, as a practical man, it would not have been possible if Hoyt was sent as inspector for the plaintiff corporation to furnish the pipe required by the contract within the times therein lim-
35 ited. This because Hoyt rejected as defective so many pipes that were entirely in accordance with the specifications, except for a little thickness at some points in the shell of the pipe which in no way affected their strength or usefulness.

That somewhere between the 10th and 15th day of September, 1887, Colonel Ludlow, the then Engineer Commissioner of the District of Columbia, came to the plaintiff's office, in Philadelphia, without any request from the plaintiff that he do so, and discussed the whole matter with the witness. Though Colonel Ludlow did not then enter into any formal agreement, he gave the witness to understand that Hoyt would be instructed to be more careful in his rejections of pipe, and to be fair and judicious in his manner of conducting the examination. The witness then told Colonel Ludlow that the plaintiff corporation could not agree to again begin work on the Washington pipe unless it was understood that no penalties would be imposed as for delay in delivering.

That to this Colonel Ludlow replied that no injustice would be done the plaintiff, and led the witness to believe that penalties for delay would be waived; otherwise the plaintiff would not have done anything further under the contract. At the conclusion of this interview the witness told Colonel Ludlow to order Hoyt's immediate return to the Millville foundry, and that on his arrival the work would at once be resumed. That Hoyt did not return until the 17th day of October following. In the meantime there was a further delay of some thirty-three days through no fault of the plaintiff.

That there was delay in commencing the work on the 3″ pipe because of the failure of the Engineer Commissioner to decide how this size should be cast, and whether in strict accordance with the specifications of the contract or as suggested by the witness in the correspondence.

Though this matter was frequently referred to in the letters back and forth, no decision was reached till November first, when the Engineer Commissioner decided that no change should be made in the method of casting as called for by the specifications. In the meantime no work was or could be done on pipe of this size.

That Hoyt finally arrived at Millville on the 17th of October, and immediately work was begun on the Washington pipe. But Hoyt was still incompetent to inspect pipe fairly, for out of a total of 2,726 lengths of pipe inspected he rejected 704, of which 169 only did not come up to specifications. The rest, 435 in number, were put in stock and sold to other customers at full contract prices.

That on the 30th day of November, when Captain Symons requested in his letter that no more pipe be cast under plaintiff's contract with the defendant, there remained to be cast about 340,000 pounds of pipe, on which the plaintiff's profits at contract prices would have been about $1,300. The plaintiff was willing to lose this profit in order to accommodate the District officials.

That after the plaintiff's letter of November 30, assenting
36 to a cancellation of the contract in so far as it related to pipe not then manufactured, provided that all pipe then cast should be taken and paid for at the regular contract prices without any deduction, and Captain Symons' reply thereto, directing the plaintiff to send on and deliver the pipe then manufactured and

accepted by Hoyt, the value of the pipe actually shipped to and accepted by the District at contract rates was $11,404.09. Had witness supposed this pipe would not be paid for at contract rates, or that fines or penalties would be charged against it, none of it would have been sent.

That after receiving from Captain Symons his letter of November 30, saying that the pipe could not be laid until after a further appropriation by Congress, the plaintiff did not make any particular haste to deliver what had then been cast and inspected. It was sent as schooners could be conveniently chartered. One consignment shipped by the schooner Morton from the Millville foundry on January 12, 1888, did not arrive until the 27th of February. The schooner was paid for the trip and not for the time consumed in making it.

That under date March 28, 1888, the plaintiff received the account from the auditor of the District and a letter under date the 30th of the same month, enclosing two checks, one for $2,369.29 and another for $2,922.42. This letter did not indicate whether or not these checks were in full. But the plaintiff received shortly thereafter a statement of account showing practically that fines and penalties as for delay had been charged to an amount about equal to all the pipe shipped after the 1st day of December. That witness protested against this way of settling the account and went to Washington two or three times with regard to it. The treasurer of the company also went several times during the next year or two to Washington in an effort to secure a just settlement of the account. On one occasion the witness was referred by the then Commissioners to Colonel Ludlow, who had ceased to be a District Commissioner and was engaged on light-house duty at the city of Detroit. The witness went twice to Detroit to see Colonel Ludlow for the purpose, if possible, of having him recommend a readjustment of the account. On one occasion only did the witness see Colonel Ludlow and then he refused to make an- recommendation whatever with regard to the matter.

During this period also the witness wrote two letters to the Commissioners, dated, respectively, February 5, 1889, and November 10, 1892, in words and figures following:

FEB. 9, 1889.

Captain James L. Lusk.

DEAR SIR: In accordance with our conversation of a few days ago we write about the contract for cast-iron pipe entered into with the District of Columbia 29th June, 1887, from the final payment of which there was a deduction of $11,059.16. This deduction was made on account of certain delays in deliveries and expenses attending the inspection. These were caused by some question that arose regarding appointment of inspector, whom, from our previous
37 experience, we felt was antagonistic to us and exercised his power without proper consideration.

The request we made of Col. Ludlow was that if he desired Mr. Hoyt (who was the man sent us) to act as inspector that additional

time to complete the contract be given us. We felt this to be but a reasonable request, and when making it disclaimed all desire to shirk any rigidity of inspection, even should we consider such to be overexacting, wishing only to avoid a double loss of replacing work and having demurrage charged for the time so consumed. We regretted that this suggestion gave rise to a correspondence as to whether or not the manufacturer had a right, for any cause, to object to an inspector, and which point, from the first, we had endeavored to avoid by only asking for an additional time.

Col. Ludlow when attending the Centennial celebration in Philadelphia called on us, and while the position taken by him was that he could not formally waive the terms of the contract, yet, as everything was most carefully talked over between us, we considered an understanding was reached, and hence were surprised when the account was sent us with the deductions made from it.

We believe that this briefly covers the status of the matter, except perhaps it may be well to refer to the general character of cast-iron-pipe specifications in which the requirements are laid down with such rigidness that it is an impossibility to turn out practicable work in view of this fact, and the acceptance or rejection of the pipes is a matter of judgment and preference of the party passing upon them.

In going over the grounds above we have not taken up the details of the question, preferring, when you are ready, to go into them and to do so personally with you instead of confusing these general statements with what would necessarily occupy much space.

Awaiting your reply, I am,
Yours truly, WALTER WOOD, *President.*

P. S.—Enclosed we hand you our copy of your account, showing the deductions.

Copy.

NOVEMBER 10, 1892.

To the Commissioners of District of Columbia, Washington, D. C.

GENTLEMEN: We have on our books an open account, amounting to $11,059.16, against the District, remaining over from a contract which we made with the then Commissioners on the 29th of June, 1887, for furnishing cast-iron water pipe, and which balance is largely composed of certain deductions made on account of delays in delivery, which delays were caused by some questions that arose regarding the inspection of the pipes by a person who, we felt, from some previous experience which we had with him, had exercised his power arbitrarily and without proper consideration.

Before commencing to cast the pipes we requested the Engineer Commissioner to—if he desired Mr. Hoyt (who was the party
38 who had before inspected at our foundry) to act as inspector in this instance—grant us additional time to complete the contract, disclaiming all desire to shirk any rigidity of inspection, even should we consider such to be overexacting, which

request we felt to be but a reasonable one, as we desired only to avoid the double loss of replacing castings that might be rejected by the inspector and the penalty incident to the time consumed in doing so.

To our regret, this suggestion gave rise to correspondence as to whether or not a manufacturer had a right for any cause to object to an inspector, which question we had endeavored to avoid by only asking for additional time for the reasons above referred to.

Col. Ludlow, the then Engineer Commissioner, being in Philadelphia about this time, called on us, and all the points at issue were very fully talked over between us; and while the position taken by him was that he could not formally waive any of the terms of the contract, an understanding was reached satisfactory to both of us, and hence we were greatly surprised when the account was sent to us with the deductions made from it.

We beg to particularly call to your attention the amount of the deductions, which are, in our opinion, excessive and very much greater than any loss which could possibly have fallen on the District by reason of its non-receipt of the pipes at the specified times, the contract providing that one-half should be delivered by the 25th of September and the balance by the 10th of November of the year in which the contract was made, whereas shipments were commenced on the 8th of November, 1887, and completed on the 14th of January in the following year, an average difference of time of less than two months, making it difficult, not to say impossible, for us to imagine that a loss to the extent of the amount charged against us could possibly fall on the District by reason of so short a delay, and we therefore ask that the matter be reconsidered and a settlement made.

We desire further to say that before our deliveries were complete the Commissioners, finding that their appropriation was nearly exhausted, asked us whether we would be willing to stop making the pipes and to cancel the balance of the contract; to which request, although the dull season was on us, orders being very desirable and prices materially lower than when we entered into the contract, we acceded, making it, however, a provise in the letter which we wrote accepting such cancellation that our full account should be paid without any deduction; whereupon the contract was cancelled and we stopped making the pipes.

We believe this fully states our case, except that it may perhaps be well to refer to the general character of the specifications for cast-iron pipe, which seldom have in them such rigid requirements as those which form a part of the contract we refer to, which is evidenced by the fact that none which have been issued by the District since the above-named year have contained such severe requirements, particularly in the matter of delivery, we having executed several contracts since that time to the satisfaction of both parties.

39 In going over the matter, as we have in this communication, we have not taken up the details of the account, preferring, when you are ready, to go into them personally with you and

explain many points that can hardly be gone over by correspondence. We desire, however, to get it settled and an interview at which all the points can be thoroughly gone into.

Yours very truly, CAMDEN IRON WORKS.

Dictated by Wm. E. Newhall, treas.

In reply to the last of these letters the plaintiff received a letter from the District Commissioners' office as follows:

WASHINGTON, *Nov.* 21, 1892.

Mr. Wm. E. Newhall, Camden iron works, Camden, N. J.

DEAR SIR: Relative to your claim for balance alleged to be due you on account of contract of June 29, 1887, I am directed to inform you that the account referred to was settled more than four years ago, and that your only recourse, if you desire relief, is to apply to Congress therefor.

Respectfully, JAMES CAMPBELL,
Acting Secretary.

That this was the first time the plaintiff was informed that the Commissioners would not or could not readjust the account. That thereupon, and in accordance with the suggestion of the Commissioners last referred to, the plaintiff procured a bill to be introduced in Congress authorizing payment of the balance due for pipe furnished under the contract. This was done on the 3d day of February, 1893, by the member of Congress from the Camden district of New Jersey. Neither the witness nor any other officer of the plaintiff corporation had had any previous experience in legislative matters, but they all assumed that the bill was mere matter of routine; that it would be referred to the District Commissioners and its enactment into law recommended by them. After waiting a year, during which no action was taken by Congress on the bill so introduced, the plaintiff gave up all efforts to secure a settlement of the account out of court, and counsel was retained to bring suit. This was done during the spring or early summer of the year 1894. After this the matter was entrusted entirely to the lawyer so retained.

And thereupon the plaintiff further gave evidence by one CHRISTOPHER MILLER, who testified, upon direct examination, that he had been an inspector at the plaintiff's Millville foundry for twenty years and upwards, and was acquainted with William J. Hoyt, having met him, while inspector for the Washington work at the Millville foundry, in 1887; that witness was present with Hoyt when pipe made for the defendant was inspected at the Millville foundry, and that a great deal of the pipe rejected by Hoyt was put in stock and sold to other customers at full contract rates. And
40 thereupon counsel for the plaintiff asked the witness Miller the following question:

Q. Were any of the pipe that were thrown out by him good?

A. To which the defendant, by its counsel, interposed and objected upon the ground that under the contract, Hoyt being accepted by the plaintiff as inspector, his decision was final between the parties, and evidence was not admissible to show an error of judgment on his part; but the court overruled the objection and permitted the said question to be asked and the answer thereto to be given to the jury, and thereupon the witness answered as follows:

There were plenty of them. Some of the pipe rejected had only little blisters on the side, but that did not interfere with the usefulness of the pipe at all. Some of them I could not find anything the matter with. If the pipe had not been good after their rejection I would not have taken them back in stock as was done.

And thereupon the defendant, by its counsel, duly excepted to the said ruling of the court in permitting the said question to be answered, and said exception was noted at the time upon the minutes of the court.

And thereupon the witness further gave evidence, upon direct examination, tending to show that the pipe was inspected by measurement and hydraulic pressure, and when the pipe was found to be good, after rejection by Hoyt, they were replaced in stock; that about 400 pipes were rejected by Hoyt which in the opinion of the witness were perfectly good and should have been accepted, and that of the whole lot rejected by him only 140, in the opinion of the witness, were actually bad; that the good pipe which were rejected were afterwards sold to different customers in open market, and no complaints were ever received that they were bad.

And thereupon the witness further gave evidence by one JAMES F. FANNING, who testified, upon direct examination, that he was the shipping clerk for the plaintiff corporation at Millville foundry, and had been in the employ of the Millville foundry for twenty-six years; that the plaintiff's foundry possessed first-class facilities in 1887 for casting pipe such as were needed in the contract with the District; that he knew William J. Hoyt, the District inspector, having met him in Millville in August, 1887; that no pipes were submitted to Hoyt's inspection in that month, because he was so rigid and unreasonable that it was next to impossible to cast a pipe that would come up to his requirements. In the opinion of the witness he was an incompetent man for such inspection; that after Hoyt left in August he did not return again to Millville until the 17th of October, 1887.

And thereupon counsel for the plaintiff asked the witness the following question:

Now, will you describe the process of getting ready to cast pipe for a given order down at the Millville foundry?

To which counsel for the defendant interposed and objected, on the ground that under the contract the plaintiff had agreed
41 to furnish the pipe within a given time, and it is immaterial to show that a longer time would be required because of the method in which the plaintiff cast its pipe; but the court overruled the objection and permitted the said question to be asked and the

answer thereto to be given to the jury, and thereupon the said witness answered the said question as follows:

I got the Washington order August 5, 1887, and the sizes were 3, 4, 6, and 12 inch pipe. We were ordered to prepare head patterns according to the specifications sent by the defendant's engineer department for the different sizes. When they sent the specifications, blue prints, and drawings we started to make the head patterns. Forming the measurements in the drawings, we made the three-inch pipe practically at a guess. Three head patterns for the three-inch pipe, three head patterns for the four-inch pipe, and six head patterns for the six-inch pipe, and two head patterns for the twelve-inch pipe—in all fourteen head patterns to be made. We could have gotten those ready in from ten days to two weeks or shorter than that sometimes. It takes about ten days to get them ready. Then we started to make pipe from those head patterns.

And thereupon the defendant, by its counsel, duly excepted to the said ruling of the court in permitting the said question to be answered, and said exception was noted at the time upon the minutes of the court.

And thereupon the witness further gave evidence that it would have taken about forty-three days to complete the Washington order if the entire force had been put to work on that one order, irrespective of other work.

Many of the pipe rejected by the inspector, Hoyt, were fairly up to the specifications of the contract, and those which our own inspector, Miller, said were good were put back in stock and sold to other customers at full market rates. We first received at Millville orders to go ahead with the Washington work from our headquarters in Philadelphia on the morning of August 5, and immediately set about preparing to cast the pipe. A large quantity of pipe, perhaps one-third of the entire order, was cast during the months of August and September, but when the work was suspended on the Washington contract the pipe so cast was sold to other customers of the plaintiff in filling contracts. After it was determined to resume work, about the middle of September, we could have begun any day that Inspector Hoyt might arrive. He came, as before stated, on the 17th of October, and we quit work on the Washington order on the 1st of December. During December, as there did not seem to be any hurry about sending on the pipe, they were sent as we could charter schooners for the purpose. The schooners so chartered were paid by the trip.

And thereupon counsel for the plaintiff announced that they had no more testimony to offer.

42 After the foregoing proceedings, which are hereby made a part hereof, the defendant, to maintain the issues on its part joined, offered and gave evidence as follows:

By THOMAS W. SYMONS, who testified that he was assistant to the Engineer Commissioner and in charge of the water works and sewerage in the year 1887; that he wrote the letters which have been offered in evidence; that he was acquainted with Mr. Wood,

the president of the Camden iron works, and with Mr. Hoyt, the inspector of pipes intended for water-main service; that there was a great deal of building going on in the District in that year and a great need for the pipe called for under the contract with the Camden iron works; that he visited Camden during the time of the contract and saw the representative of the company; that he went there to see how the work was getting along and to see what was the real objection to Hoyt as an inspector; that Hoyt explained why pipe had been rejected by him; that representatives of the company were present whom he did not know, though he did not think Mr. Wood was among them; that this visit was made in the fall of 1887; that the reasons for delay in delivering the pipe, as far as he knew, appeared in the correspondence; that the settlement made was with the knowledge and approval of the witness and under his direction at the time it was made; that Colonel Ludlow, the then Engineer Commissioner, is now in Havana.

On cross-examination the witness further testified, in response to questions by the plaintiff's attorney, that he was assistant to Colonel Ludlow, the Engineer Commissioner, in 1887, and had charge of the details relating to the pipe castings under the contract offered in evidence; that he did not know, when he wrote the letter of July 9, that the contract had not been signed by the District Commissioners, and did not consider it material; that he considered it in accordance with the contract to charge against the plaintiff fines for the delay occasioned by the failure of Hoyt to arrive at the Millville foundry after he had been requested so to do; that when he requested the plaintiff, in reply to their letter of November 30, assenting to a cancellation of the contract so far as it related to pipes not cast, that all pipes cast should be taken and paid for at contract rates, and to send on and deliver pipe then cast, he did not intend to confiscate by way of fines all pipes that might be sent thereafter; that he did not at that time give any consideration to the question of fines and penalties, which was a matter to be adjusted after the contract was finished; that his intentions related principally to getting the pipe for the benefit of the city; that when he stated in his letter of November 30 that the only question involved was the one of available funds he did not have "up his sleeve" the question about fines which developed later and after the pipe were received; that he did not consider that the contractors had any reasonable or proper excuse for failure to deliver the pipe on time; that, in his opinion, a reasonable excuse for the failure would be that the foundry burned down or the pits burned up.

On redirect examination, in response to questions propounded by the counsel for the defendant, the witness further testified that he had heard the testimony of the witness Fanning about the
43 rejection of pipes by Inspector Hoyt, and that, in his opinion, the proportion of pipes rejected by Hoyt was not very large; that there was very little difference in the method of casting commercial pipe, though nearly all water works have a little different drawing on the bell head, though very little; that the witness had examined some of the pipes rejected by Hoyt and found that they

were eccentric and some of them were crooked on the small end, but most of his rejections were due to the eccentricities of the pipes.

On further cross-examination, in response to questions propounded by the counsel for the plaintiff, the witness testified that he went to Millville foundry, on the occasion of the visit he had mentioned, in the morning and back again at night; that he was not quite sure he went into the Millville office and did not remember whether or not he had seen the president of the company, Mr. Wood. He could not remember whether or not this visit was before or after the first of November, though he thought it was shortly after he ordered the work on the Washington contract; that he did not remember whether or not any of the pipes had then been shipped to the District; that the pipes rejected by Hoyt as being eccentric were at the works, though he did not recollect whether they were on skids or in a pile; that he determined about the eccentricities of pipes by rolling them; that he saw them rolled or possibly rolled them himself; that he did not remember how many pipes he so rejected and could not say whether or not they were not the pipe afterwards rejected and broken up by Mr. Miller, the inspector of the plaintiff company; that he did not remember having notified any official of the plaintiff company that he intended to make this visit.

On being recalled, the witness further testified, in response to questions propounded by counsel for the defendant, that a lot of pipes were purchased by the District outside of the contract, though he could not remember how many.

The defendant, further to maintain the issues on its part joined, gave evidence by HENRY F. HAYDEN tending to show that in pursuance of duly published advertisements in 1887 the plaintiff company, through its proper officers, made proposals for furnishing cast-iron water pipe to the District government; that in due course of time the said plaintiff was awarded the contract given in evidence, it being the lowest and only bidder; that many people in the District were suffering for water, and the failure of the plaintiffs to deliver the pipe contracted for was a matter of great annoyance and inconvenience to the people of the District, as well as a source of great expense to them; that so decided was the necessity for the pipe contracted for that it was deemed proper to purchase a quantity of such pipe wherever it could be found in open market and charge the excess of cost over the contract price to the plaintiff; that this was done, and pipe was purchased from Jackson and Woodin, of Berwick, Pennsylvania, and from the Sayre Pipe Foundry Company of Sayre, Pennsylvania, and the plaintiff was duly informed of this action on the part of the defendant;
44 that the plaintiff finally concluded to go on with the making of the pipe and to accept Mr. Hoyt as inspector, and they did make the pipe under his direction and it was delivered to the defendant.

Thereupon the counsel for the respective parties presented certain requests for instructions. In passing upon these the court said:

COURT: There are certain questions raised by the prayers for instructions on both sides that will have to be determined first and then I can pass specifically upon the several instructions themselves, and either grant or reject them as may be required by the determination of these questions. The first of these is whether this contract, which undoubtedly is a contract of the District of Columbia, conceded to be such by the defendant itself, is a sealed instrument, obligatory upon the District of Columbia as a sealed instrument, and therefore whether this action which is based upon it as a specialty, upon a covenant contained in it, can be maintained. If it is not a specialty the action should have been assumpsit and not covenant. This question, I understand, was determined by Justice Cole upon demurrer, and therefore it would seem to me that it has been concluded so far as the court of first instance is concerned. If I had determined the demurrer in the first instance, I would be perfectly free to overrule myself, if the conclusion were reached that my first decision was erroneous, but I cannot allow myself the same freedom of action with reference to the decision of one of my brethren who held this court at a former term. It does not appear to me, however, that there is any real difficulty over this question. Suppose you take as an illustrative decision the case of State *vs.* Macauley, 15 California, 456. This was a contract entered into be the board of State prison commissioners, acting in behalf of the State of California.

The instrument declares itself to be "An indenture made and entered into this twenty-sixth day of March, A. D. one thousand eight hundred and fifty-six, between the State of California, by Robert M. Anderson, lieutenant governor; G. W. Whitman, controller of the State of California, and Henry Bates, treasurer of the State of California, constituting the board of State prison commissioners created by an act of the legislature of said State of California entitled 'An act creating a board of State prison commissioners and defining their duties,' approved the twenty-first day of March, A. D. 1856, party of the first part, and James M. Estill, party of the second part."

The attestation clause is: "In witness whereof Robert M. Anderson, lieutenant governor of the State of California; George W. Whitman, comptroller of the State of California, and Henry Bates, treasurer of the State of California, constituting the board of State prison commissioners, and the said James M. Estill, party of the second part, have hereunto set their hands and seals the day and year first above written."

And then follows the several names constituting the board of State prison commissioners, with a scroll seal opposite each name.

45 The State of California was sued and sought to be held responsible under the contract as the deed of the State, and the objection made was that the instrument not bearing the State

seal was not its deed, but the deed of the individuals who signed it and affixed their individual seals to it. Justice Field, delivering the opinion of the court, said:

"The objection is applicable only to contracts of a private character, made in cases of a mere private agency. A different rule exists in reference to contracts executed by agents of the Government. 'In such cases,' says Mr. Justice Story, in speaking of the liability of public agents, 'the presumption prevails that the parties contract, not personally, but merely officially, within the sphere of their appropriate duties. Thus a charter-party, sealed and executed by a public officer in his own name, but describing himself as acting in behalf of the King or government for purposes connected with the public service, has been held not to bind him personally, but to be merely obligatory upon the government.'"

The justice gives other illustrations, and then, referring to the case of Stinchfield *v.* Little, in 1 Greenleaf, page 231, adds:

"Where a contract is entered into, or a deed executed in behalf of the government, by a duly authorized public agent, and the fact so appears, notwithstanding the agent may have affixed his own name and seal, it is the contract or deed of the government, who alone is responsible, and not of the agent."

The only other case that I will refer to upon that point is Sheets *vs.* Selden, 2 Wallace, 177, where a contract was entered into in the same manner by officers by their names and seals, but it bore the seal of the State—the State of Indiana. The same justice, delivering the opinion of the court in that case, said:

"In the execution of this instrument the governor and auditor acted officially and not personally, and in our judgment the deed was sufficient to pass the title of the State they represented. And it may be stated generally that when a deed is executed or a contract is made on behalf of a State by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed or contract of the State, notwithstanding that the officer may be described as one of the parties and may have affixed his individual name and seal. In such cases the State alone is bound by the deed or contract, and can alone claim its benefits."

Now, this contract appears to be the filling out of a printed form provided by the District of Columbia to be used in all contracts of this nature. The attestation clause is printed, and the body of the contract is printed. The only filling in is in the subject-matter of the contract, and the name of the party with whom the contract is made by the District of Columbia. It purports to be between the District of Columbia, of the first part, that being printed, and the Camden Iron Works, by Walter Wood, its president, of the second part, and concludes with the clause: "In witness whereof, the undersigned, William B. Webb, Samuel E. Wheatley, and William Ludlow, Commissioners of the District of Columbia, appointed under
the act of Congress entitled 'An act providing a permanent
46 form of government for the District of Columbia,' approved
June 11, 1878, and the party of the second part to these

presents have hereunto set their hands and seals the day and year first above written.

(Signed) WILLIAM B. WEBB, [L. S.]
(Signed) S. E. WHEATLEY, [L. S.]
(Signed) WILLIAM LUDLOW, [L. S.]
Commissioners of the District of Columbia.
(Signed) WALTER WOOD,
Pres't Camden Iron Works.

[Corporate Seal of Camden Iron Works.]

Signed and sealed in the presence of—
(Signed) E. H. DIEFFENBACH,
As to W. Wood, pres't."

It contemplates execution precisely in the manner that this contract has been executed. It purports to be the contract of the District of Columbia by its Commissioners. It purports to be an instrument under seal, providing for its execution by the District of Columbia through its Commissioners, with their seals, and by the other party to the contract, with its seal.

Now, if it is possible for the District Commissioners to bind the District of Columbia by an instrument under seal, the seal being the individual seal of the Commissioners of the District of Columbia, it seems to me that that has been done. If they can execute an instrument under seal without affixing the corporate seal of the District of Columbia, they have done it. It cannot be forgotten or overlooked that the District of Columbia, which had been created a body corporate for municipal purposes by the act of Feb. 21, 1871, which had been provided with the machinery of government for municipal purposes, with a governor, a Board of Public Works, and a Legislative Assembly, which had been authorized to have a seal (and that is all that is said in this act about a seal) by the act of June 11, 1878, had its whole scheme of government changed. The office of governor, the officers of the Board of Public Works, and the Legislative Assembly had been abolished in 1874 and certain temporary Commissioners had been provided for at the same time. The present existing government organized under the act of June 11, 1878, and by that act all the executive power was conferred upon the three Commissioners whose officers were thereby created. Under that statute, acting officially, they are the District of Columbia. We have a Legislative Assembly, to be sure, but the Legislative Assembly is the Congress of the United States. In that statute the United States assumed to pay one-half of the expenses of the government of the District of Columbia. It assumed the control and direction of the entire municipal governmental functions through its officers, for these Commissioners are appointed by the President of the United States and their appointment is subject to the approval of the Senate. The United States, therefore, is the government of the District of Columbia
47 through its agents, the Commissioners of the District of Columbia.

Met. R. R. *v.* D. C., 132 U. S., 9.

It has been repeatedly held that the acts of the Commissioners of the District of Columbia are the acts of the District of Columbia; that as a municipal corporation it is bound by their contractual acts or by their negligences or defaults just as it was held with reference to the Board of Public Works in Barnes *vs.* D. C., 91 U. S., 540. It was contended there that the Board of Public Works, being appointed by the President and under the law invested with the entire control of the streets of the District and charged with their regulation and repair, was independent of the municipality, the District of Columbia, and that the District of Columbia could not be held responsible for their torts, but the Supreme Court held otherwise. Now, I am of opinion that the Commissioners of the District of Columbia had power to bind the District of Columbia by an act such as is evidenced by this contract; that if they saw fit they could adopt as the seal of the District of Columbia any device that pleased their fancy; that for the purpose of binding the District of Columbia by a sealed instrument of this character they could for the time being adopt their own seals, making it a sealed instrument in that way. In the execution of this contract they acted as public officers. And it appears to me to be clear that the act of the Commissioners of the District of Columbia in the execution of this contract in affixing their individual seals was clearly not their act as individuals, but it was their act as the executive officers of the District of Columbia, and the seal adopted by them for this purpose is the seal of the District of Columbia. The evidence indicates that a seal was adopted by the District of Columbia during the time of the existence of the Legislative Assembly, the Board of Public Works, and the other offices of the former government, but that that seal had performed no function for many years, remaining in disuse and seclusion until some time after the execution of this contract, when it was resurrected from its place of deposit and put in charge of Dr. Tindall, secretary of the Board of Commissioners. There does not appear, however, to have been any distinct act of the Commissioners adopting this old seal of the District of Columbia as its present seal. While I shall feel bound by the decision of Justice Cole upon the question whether this was a sealed instrument of the District of Columbia or not, I should have no difficulty of my own that it is, and such is my own conclusion.

Now, as to the claim that this contract contemplates performance by a certain limited time, that the iron water pipe contracted for was to be delivered by certain dates, and that inasmuch as the pipe was not delivered by the dates specified in the contract, that an action of covenant cannot be maintained; that the plaintiff is driven to an action of assumpsit for work and labor done, for goods sold and delivered, and perhaps to the recovery of a *quantum meruit* instead of the contract price. However, that question need
48 not be gone into; that claim might be sustained if it appeared that time was of the essence of the contract. An illustration given by Justice Miller in the case of Phillips *vs.* Seymour, 91 U. S., where a man agreed to buy a horse on Monday, if brought to him and delivered on that day, an offer to deliver him

on Tuesday would not be within the terms of the contract; but this is not the nature of the contract that we are considering. The contract provides that one-half of the pipe contracted for shall be delivered by September 25th and the remainder on or before November 10th, 1887; but that is not all. It contemplates the possibility and the probability that it shall not be delivered half by September 25th and the balance by November 10th, for it provides that "in case the deliveries are not made as above specified there will be deducted from the contract price as herein specified one per cent. for all delinquent articles and for each and every week day that they remain delinquent." Why cannot the party of the second part under this contract, the plaintiff in this action, sue upon this contract subject to its penalties? The contract itself contemplates that the goods will not be delivered at the time contracted for, provides for that contingency by prescribing a penalty or a certain measure for ascertaining damages and liquidating them in that way. Now, it appears that the pipe contracted for was eventually delivered, and all that has been sued for was accepted. So that there can be no question as to the right of the plaintiff to sue upon this contract. It has not lost its right of action by reason of the fact that the pipe was not delivered at the time specified. The District of Columbia has recognized the validity of the contract and it has recognized the right of the plaintiff to claim compensation less damages, for it has deducted or set off liquidated damages against the price of the pipe and reduced the compensation or contract price to which the plaintiff would otherwise be entitled. The District of Columbia, by its officers, has claimed that this pipe, delivered after the date specified, was delivered in compliance with the terms of the contract, for it insists upon the penalties that are prescribed by the contract. Now, what are these penalties? Are they penalties or are they liquidated damages? The first provision is that—

"In case the deliveries are not made as above specified there will be deducted from the contract prices, as herein specified, one per cent. of the contract price for all delinquent articles for each and every week day that they remain delinquent."

Now, suppose this contract to be for the delivery of pipe of the value of $16,000. If half of this pipe were not delivered by the 25th day of September, 1887, the penalty would be one per cent. for one-half of the pipe—that is, $80 per day for every week day of delinquency; and if all the pipe were not delivered by the 10th day of November, 1887, the penalty of one per cent. for every week day would involve the loss to the plaintiff of $160 per day. Ten days would be ten per cent. of the whole contract price, and one hundred days would be the whole of the contract price, so that if the
49 plaintiff were rigidly bound to the terms of this contract and this should be construed to be liquidated damages, if for any reason, according to the claim of the District of Columbia, it was prevented from delivering the pipe contracted for for one hundred days and it did deliver it, the District could get the pipe for nothing. The plaintiff would not be entitled to anything under this contract. Now, I do not think that any argument is needed to

show that such a provision in a contract is not a provision contemplating liquidated damages, but a penalty, and that view is sustained by the weight of authority. I have no difficulty at all over the construction of that provision. It is not liquidated damages. It is not claimed to be liquidated damages. It is not stipulated for as liquidated damages, and it is out of all proportion to the damages the District might sustain by reason of non-delivery on time, and still more clearly is that so when you consider the provision found on the next page: "The work must be commenced within (blank) days and completed within 136 days after the date of the execution of the contract; if not so completed the pay of all inspectors employed on the work after the time fixed for its completion will be charged against and deducted from any money that may be due or become due to the contractor, as well also the sum of $10 *per diem* for the same period, estimated as liquidated and fixed damages to the District arising from failure to complete the work at the time specified, time of completion of the contract being an essential element and consideration." There the contract makes a clear distinction between the loss of one per cent. per day for failure to perform in time and this stipulation of liquidated damages. This is called liquidated damages, "fixed damages to the District of Columbia arising from failure to complete the work at the time specified, the time of completion of the contract being an essential element and consideration." There is somewhat of a lack of agreement between this provision and the preceding provision. This is called liquidated damages, and the time of completion is declared to be of the essence of the contract. Nothing of the kind is said about the preceding provision, and it appears, therefore, to be clear that the provision for the deduction of one per cent. of the contract price for the delinquent articles is a penalty. It is claimed by the District of Columbia that the 136 days should begin to run from the day of the date of the contract. Whether that is so or not depends upon the construction of the contract, and it is a question for the court to determine. The provision is that "all work must be commenced within blank days and completed within 136 days after the date of the execution of the contract" *the date of the execution of the contract.*" It appears to me that if it had been intended to indicate by that language the *date* of the contract it would have been much easier and more simple to have said from the date of the contract than from the date of the execution of the contract Another indication that the Commissioners intended by this to mean the date when the contract was executed is the fact that under the law, until the
50 contract is executed by the Commissioners of the District of Columbia in compliance with law under an express provision of statute, it shall be absolutely void. Now, it appears by the testimony that the Camden iron works, when it executed this contract, affixed the name of its president and the seal of the corporation, it had not been executed by the District of Columbia through its Commissioners. The date of the instrument, the 29th day of June, 1887, is the day when the president of this corpora-

tion signed it and affixed the seal. He forwarded it to the Commissioners of the District of Columbia, and repeatedly wrote them asking that the contract be executed by the District of Columbia and returned to him in order that he might begin his work. He was bound to know, I suppose that he did know, that until the contract was executed by the Commissioners of the District of Columbia, in compliance with law, it was absolutely void, and that it was not safe for him to enter upon the performance of the contract. It further appears by the evidence that the contract was not returned to him with the signatures of the Commissioners affixed until the 4th day of August, and then it was executed by only two of the three Commissioners, and as an instrument at that time it was not complete—as a contract it was not complete. In suing upon this contract the plaintiff had been obliged to rely upon the copy of the instrument in the hands of the District of Columbia, and that is the only depositary where a completely executed instrument is found. The plaintiff has a perfect copy of the contract, but it was only executed by Commissioners Wheatley and Ludlow. It appears by the evidence that Mr. Webb was sick at that time, and possibly away from the office of the District of Columbia, and he probably did not execute that contract until long after August 4th. Now, if the contract is not in force until executed in compliance with law, it would be a rather anomalous provision to require the contracting party to begin the performance of his contract before it was actually in force, and possibly to be subjected to its penalties before it was actually executed by the Commissioners of the District of Columbia. And if the contention that these provisions all related to the date of the contract instead of the date of the execution of the contract is to hold, then, that this absurd result is possible, that if the Commissioners of the District delayed in executing the contract until the time had elapsed within which the pipe was to have been delivered, then the plaintiff was subjected to all the penalties of the contract before the contract was in force.

Now, another proposition is this: It is claimed that the time of performance, in the first place, was waived by the Engineer Commissioner Ludlow in a private conversation—that is, a conversation in Philadelphia, not at the office of the Commissioners—between him and the president of this plaintiff company, and it is also claimed in behalf of the plaintiff that about November the 30th there was some correspondence between the plaintiff and the District Commissioners, in which the District Commissioners asked the plaintiff company to waive so much of the contract as related to pipe not then cast. That was the 30th day of November, 1887,
51 when, as it is claimed by the District of Columbia now, this contract was no longer in force, and that the plaintiff cannot sue upon the contract because the pipe had not been delivered by November the 10th. We have a letter from the Engineer Commissioners on the 30th of November, asking the plaintiff to waive its right under the contract to deliver the balance undelivered of the 12-inch pipe. The plaintiff, by its president, replied

that it would do so, provided the District would not insist upon any penalties or any damages for failure to deliver on time and would pay for the pipe according to the contract price. The reply to that was, Send the pipe on. Now, the question raised is whether that was not a new contract by parol and a substitute for the specialty, and whether the remedy of the plaintiff is not necessarily in assumpsit instead of covenant. I think not. It raises two questions. In the first place, whether the time of performance might not be waived and the right to sue upon the contract still be preserved. I think it perfectly clear that it may be. In the second place, whether the District of Columbia, through its municipal officers, might not be estopped to claim that the contract was not performed in time, and be estopped to claim the penalties provided for in the contract for non-delivery on time. It appears to me that both of these propositions are correct; that the time of performance may be waived and the right to compensation under the contract as a covenant may be preserved, and that the District of Columbia by its acts may estop itself from claiming penalties. In the case of Phillips *vs.* Seymour, 91 U. S., at page 650, Justice Miller says in the last paragraph:

"If the builder has done a large and valuable part of the work, but yet has failed to complete the whole or any specific part of the building or structure within the time limited by his covenant, the other party, when that time arrives, has the option of abandoning the contract for such failure or of permitting the party in default to go on. If he abandons the contract and notifies the other party, the failing contractor cannot recover on the covenant, because he cannot make or prove the necessary allegation of performance on his own part. What remedy he may have in assumpsit for work and labor done, materials furnished, etc., we need not inquire here; but if the other party says to him, I prefer you should finish your work, or should impliedly say so by standing by and permitting it to be done, then he so far waive- absolute performance as to consent to be liable on his covenant for the contract price of the work when completed."

Now, the only other question that occurs to me that I have a memorandum of is the question of interest. It is claimed that inasmuch as the District of Columbia was not sued promptly when the cause of action accrued or promptly after the cause of action accrued to the plaintiff that the plaintiff has been guilty of laches and is not entitled to interest. The only cases that are cited do not touch this case. The questions were entirely different. The question now is whether in an action of this character the jury are to be controlled by the court and directed whether or not they shall award interest as damages for the non-payment of the contract price if they give the plaintiff a verdict. I think not. The
52 statute allows the jury to pass upon that question. It is not in the power of the court in a case of this character to determine the question of interest unless the question arises upon the face of the contract. This would not be a question for the court to determine.

These considerations result in the necessary rejection of the first, second, and third instructions asked by the defendant; also the last one handed in this morning, which is the sixth.

This being all the evidence, the plaintiff, by its counsel, prayed the court to instruct the jury as follows:

If the jury believe from the evidence that there was a special contract between the plaintiff and the defendant in relation to the manufacture and delivery of certain cast-iron pipe, although the same was not fully performed by either party, yet if the plaintiff cast and delivered pipe in accordance with the specifications of said contract and the defendant accepted the same and appropriated it to its own use, the plaintiff is entitled to recover in this action the value of the pipe so accepted at contract prices, deducting therefrom the liquidated damages specified in said contract sustained by the defendant, if any, by the failure of the plaintiff to deliver the pipe within the time limited by the contract, and any payments on the same.

(Granted.)

Unless the jury find from the evidence that the defendant suffered damage by reason of the failure of the plaintiff to deliver pipe within the time or times limited in the contract, their verdict must be for the plaintiff for the full value of the pipe at contract prices actually received and accepted by the defendant, less payments made on account of the same, and the liquidated damages specified in said contract as for delay in delivery.

(Covered by No. 1; not granted.)

If the jury believe from the evidence that the plaintiff corporation was prevented from completing the delivery of pipe by it stipulated to be manufactured and delivered under the contract offered in evidence within the time or times therein limited by any act or omission on the part of the defendant, then the defendant is not entitled to charge against the plaintiff any fines or penalties for such delay in delivering pipes as was occasioned by such act or omission.

(Granted.)

If the jury believe from the evidence that the defendant by its silence or conduct caused the plaintiff corporation to believe, on or about the 1st day of December, A. D. 1877, that all pipe thereafter delivered would be taken and paid for at contract rates, without any deduction, and thereby induced the plaintiff to act on that belief and thereafter deliver pipe to the defendant, which the plaintiff would not have otherwise done, and the defendant accepted such pipe, the defendant is estopped from charging against the plaintiff any fines or penalties for not delivering such pipe within the time or times specified by the contract.

Granted.

53 And thereupon the defendant, by its counsel, prayed the court to instruct the jury as follows:

On the whole evidence in this case the jury are instructed that their verdict should be for the defendant.

Refused.

The jury are instructed that there can be no recovery against the defendant in this case based upon the contract of June 29th, 1887, offered in evidence by the plaintiff.

Refused.

The jury are instructed that the plaintiff is not entitled to recover in this action the price of iron pipe delivered to the defendant after November 10th, 1887.

Refused.

If the jury believe from the evidence that the failure of plaintiff to deliver the iron pipes mentioned in the contract given in evidence at the times and in the quantities specified hindered and delayed the defendant in extending the water service in 1887, then the defendant had a right to charge against the price it agreed to pay the plaintiff for the pipe it undertook to deliver as liquidated damages the penalties provided in the contract.

Refused.

If the jury find for the plaintiff, they are instructed that the plaintiff is not entitled to interest on its claim prior to the institution of this suit.

Refused.

The jury are instructed that the contract given in evidence in this case was executed on the 29th of June, 1887, and the plaintiff is estopped from claiming it was executed on any other day.

Refused.

The jury are instructed that the contract given in evidence in this case was executed on the 29th of June, 1887, and the time within which the iron pipes specified in said contract were to be delivered is to be computed from said date.

Refused.

To the refusal of the court to grant said several prayers of the defendant and allow the same to be read to the jury and the granting of the several prayers of the plaintiff the defendant, by its counsel, excepted, severally and respectively, and said exceptions were noted on the minutes of the court, and said counsel prays the court to sign and seal this the defendant's bill of exceptions to said several rulings and each of them, which is accordingly done, now for then, this 23d day of February, A. D. 1899.

A. C. BRADLEY, *Justice.*

Whereupon the court of its own motion charged the jury as follows:

By the COURT: After all, gentlemen of the jury, this case which promised so many complications is simplified very materially and there are very few questions that you will be called upon to consider in making up your verdict. It is conceded that the
54 amount shown to be due by the District of Columbia on account of pipe furnished by the plaintiff, received and accepted by the District of Columbia without any credit on account of this indebtedness because of penalties or forfeitures, is $11,044.16. The plaintiff claims that it is entitled to recover that amount, with interest from the 27th day of February, 1888, because it says that

the entire amount was due at that time, that being the date when the last instalment of pipe was received by the District of Columbia from the plaintiff.

It claims interest upon this amount because at that time it says the debt was due and because it says the law allows interest as damages for the non-payment of the debt that is overdue. The statute relating to interest in the District of Columbia reads: "The rate of interest upon judgments or decrees and upon the loan or forbearance of any money or goods or things in action shall continue to be six dollars upon the hundred dollars for one year and after that rate for a greater or less sum or for longer or shorter time, except as provided in this chapter," and then it is provided that if any greater rate of interest is contracted for by a contract that is not in writing all the interest shall be forfeited, and that if any greater rate of interest than ten per cent. is contracted for in writing all the interest shall be forfeited. By this statute Congress fixes the rate of interest for the forbearance of payment of debts at six per cent., and as well the same rate of interest upon judgments and decrees. As business men you know very well that if you receive a promissory note that does not bear interest and the note is not paid at maturity you have a right to demand of the maker of that note or of the parties to it the payment of interest at six per cent. after maturity. So if the note bears upon its face a greater rate of interest than six per cent, but it does not provide for a continuance of that rate after maturity, the holder of that note is entitled to exact the rate of interest specified in the note up to the time of maturity and the legal rate of six per cent. after maturity. So it is a fact, as you know, if a merchant renders a bill claiming an amount for goods sold and delivered to his debtor and the debtor does not pay, he can exact from him interest upon the bill in making payment. While such is the law, yet there may be circumstances in a case that in the judgment of the jury would disentitle the party who claims interest from exacting or receiving it. Now, the question is whether there are any circumstances in this case differing from the circumstance of ordinary delay where a creditor fails to bring an action which would indicate as matter of justice and good faith between this plaintiff and the District of Columbia that the District should not be called upon to pay interest. The mere fact that a man does not bring his action within a certain time is certainly no justification for the claim on the part of the defendant that he ought not to pay interest. He has the use of the money during the time that he is not sued and before he is compelled to pay by the process of the court, and there is no good reason in morals or in law why he should not pay interest for the detention and use of the money. With these remarks the court will submit to you whether under all the circumstances in this case
55 the District of Columbia should pay interest upon whatever amount you find to be due from the 27th day of February, 1888, or whether it should pay interest from a later date. Now, under the contract that has been offered in evidence, which fixes the rights of the plaintiff and defendant, it is stipulated that unless the pipe that is contracted for shall all be delivered within 136

days from the date of the execution of the contract a penalty shall be deducted from the payments that would become due under the contract of $10 per day, and, in addition, the compensation paid after that time to inspectors who were engaged upon the work of inspecting the pipe. It appears by the evidence that this contract did not take effect until somewhere between the first and the fourth of August. It appears, I believe, that the plaintiff received a copy of the contract on the 5th day of August, and that he had made several efforts prior to that time to obtain from the Commissioners of the District of Columbia a copy of the contract. As matter of law, ordinarily an instrument of this nature does not take effect until delivery. Although it was signed on the 29th day of June, 1887, by the Camden iron works, yet it did not become a contract until it was signed and executed by the Commissioners of the District of Columbia. Now, when did they execute it? That you must determine from the evidence in this case. It took effect as a contract when they executed and delivered it. In addition to the difficulty arising out of the common-law doctrine that a written contract is not effectual before delivery, the statute relating to contracts made by the Commissioners of the District of Columbia, the act of June 11, 1878, provide that "no contract involving an expenditure of more than one hundred dollars shall be valid until recorded and signed as aforesaid"—signed by all of the Commissioners of the District of Columbia. So that, however the court regards the question of delivery as affecting the time when this contract shall take effect, the fact is that under the law this contract was not valid and could not take effect under this statute until it was executed and signed by all of the Commissioners of the District of Columbia. Now, when you determine the time when the contract was actually executed by the signatures of the Commissioners and delivered to the plaintiff, from that date you will begin to count the 136 days within which the contract was to be completed, and until the expiration of 136 days there can be no penalties charged against the amount that the plaintiff is entitled to receive under his contract for pipe delivered, received, and accepted by the District of Columbia. This one per cent. for failure for each day's delay in delivering one half by September 25th and the other half by November 10th has been excluded from your consideration because the court regards that as plainly a penalty which the law will not enforce. So the only question of damage relates to the provision that after 136 days $10 a day shall be deducted for delay, and as well the expense of the pay of the inspector.

Now, as against that the plaintiff claims that there was a delay in addition to this 136 days, a delay of 30 days or more, occasioned by the act of the Commissioners of the District of Columbia or their agents. Involved in this delay is one element which is said to be attributable to caprice on the part of the inspector in rejecting pipe that he ought to have accepted, because it really did comply with the contract and specifications. If that were definitely and explicitly shown, I think there would be

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no more question about it, for the plaintiff is entitled to claim that it is not liable for any delays that were thus occasioned; but it seems to me that the evidence is entirely too indefinite for the jury to figure upon it. You cannot tell from the testimony, I think, just what pipes were capriciously rejected by the inspector that were manufactured in compliance with the contract and specifications. There is some evidence tending to show that Hoyt was capricious; that he was not a man of good judgment or of unbiased judgment in reference to the plaintiff; but it seems to me that to justify a claim by the plaintiff of specific delay on account of this capriciousness of the inspector the testimony ought to be specific and definite. With reference to the claim that the inspector was delayed for some length of time, if that is definite, and the time that is claimed the delay was caused by that neglect to inspect, by the neglect of the inspector to go to Philadelphia and inspect the water pipe, to the extent that you find that it is proven, I think it is clear that the plaintiff is entitled to add that to the 136 days; then, having found the time at which the ten dollars a day should begin to be charged, you should also determine whether within that time there is any penalty to be charged by reason of the pay of the inspector. The pay of the inspector must be charged after the expiration of the 136 days, and whatever further amount, at $10 per day, you may see fit to add under the testimony. If the inspectors performed their work before that time and were paid, it is not chargeable against the plaintiff. Now, the plaintiff claims, in addition to that, that no deductions ought to be allowed at all, because on the 30th day of November, or about that time, some correspondence was had between Major Symons or Col. Ludlow, representing the District of Columbia, and the plaintiff, in which the plaintiff was asked to forbear the delivery of any further pieces of 12-inch pipe under their contract. The plaintiff replied that it was perfectly willing to do that, provided the District would pay for the pipe subsequently delivered at contract prices, without deductions, and the reply was received by plaintiff from the District of Columbia, through its agents, to send on the pipe. Now, if you believe that by that act the District of Columbia intended to mislead the plaintiff into sending this pipe, acting upon the theory that no penalties were to be charged against it, and, acting upon that idea, the pipe was subsequently delivered, the District of Columbia is not entitled to charge up against the plaintiff such penalties. So, if you believe from all the circumstances in evidence that the District of Columbia, through its officers, waived the imposition of these penalties about the 30th day of November or the first day of December, as
57 claimed, the District of Columbia is bound by such waiver and cannot charge up against the amount to which the plaintiff is entitled this $10 a day on the pay of the inspectors.

Now, with these remarks, gentlemen of the jury, it may be a matter of mere mathematics to determine what amount the plaintiff is entitled to. Determine whether the District of Columbia is entitled to any deductions from this amount. If so, what, and when you have determined the amount also determine from what

time the plaintiff is entitled to interest on the amount that you find to be due, and return your verdict for that amount, with such interest.

To which charge by the court there were no exceptions.

A. C. BRADLEY, *Justice.*

February 20, 1899.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the above and foregoing pages, numbered from 1 to 104, inclusive, to be a true and correct transcript of the record and proceedings in said court, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 37661, at law, wherein Camden Iron Works is plaintiff and The District of Columbia is defendant, as the same remains upon the files and of record in the said supreme court of the District of Columbia.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 10th day of March, A. D. 1899.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 884. The District of Columbia, appellant, *vs.* Camden Iron Works. Court of Appeals, District of Columbia. Filed Mar. 10, 1899. Robert Willett, clerk.

58 FRIDAY, *May 12th, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant, *vs.* CAMDEN IRON WORKS. } No. 884.

The argument in the above-entitled cause was commenced by Mr. A. B. Duvall, attorney for the appellant, and was continued by Mr. Samuel Maddox, attorney for the appellee, and was concluded by Mr. A. B. Duvall, attorney for the appellant.

59 THE DISTRICT OF COLUMBIA, Appellant, *vs.* CAMDEN IRON WORKS. } No. 884.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

This action was brought by the appellee, The Camden Iron Works, a corporation created under the laws of the State of New Jersey, against the District of Columbia, to recover the price of certain iron pipes manufactured for and delivered to the defendant by the plain-

tiff, under contract under seal. The action is brought in covenant, upon the theory and according to the contention of the plaintiff, that the contract is a specialty contract of the defendant, and one of the principal questions in the case is, whether the agreement sued on is the deed of the defendant, or only a simple contract.

There were several pleas interposed,—all going to and denying the right of the plaintiff to recover,—though some of them in form are appropriate only to an action of *assumpsit;* but among the pleas is the plea of *non est factum.* There is no question made, however, as to the inconsistency or inappropriateness of the pleas, and issue was joined on them all, except the plea of the statute of limitations, to which a demurrer was entered; and the demurrer was sustained and the plea ruled bad. This plea of the statute of limitations of three years was pleaded as a bar, upon the theory that the proper action upon the contract was *assumpsit*, and not covenant. But the court did not entertain that view, and accordingly ruled the plea bad on demurrer.

The contract bears date the 29th day of June, 1887, and on its face and by its terms it professes to be made by the District of Columbia, of the first part, and the Camden Iron Works, by Walter Wood, president, of the second part. The contract is conceded to have been for and in behalf of the municipal corporation of the District of Columbia and for material to be supplied for the water department of the District of Columbia; and the contract throughout professes to be made by and between the District of Columbia and the Camden Iron Works. The conclusion of the contract is as follows:

"In witness whereof, the undersigned, William B. Webb, Samuel E. Wheatley, and William Ludlow, Commissioners of the District of Columbia, appointed under the act of Congress entitled 'An act providing a permanent form of government for the District of Columbia,' approved June 11, 1878, and the party of the second part to these presents, have hereunto set their hands and seals the day and year first above written.

"WILLIAM B. WEBB, [L. S.]
"S. E. WHEATLEY, [L. S.]
"WILLIAM LUDLOW, [L. S.]
"*Commissioners of the District of Columbia.*
"WALTER WOOD,
"*Pres't Camden Iron Works.*

[Corporate Seal Camden Iron Works.]

"Signed and sealed in the presence of—
"E. H. DIEFFENBACH."

This contract was proved and offered in evidence by the plaintiff, but its admissibility was objected to by the defendant, upon the ground that the declaration was in covenant, declaring upon a sealed instrument, whereas the contract offered in evidence is not under the corporate seal of the District of Columbia, and therefore not the covenant of the defendant, but a simple contract merely. The objection being overruled, the defendant excepted.

The plaintiff then proved that the municipal corporation of the District of Columbia had a corporate seal, but that the same had not been generally used, until after the contract here sued upon had been executed, and had only been used in executing deeds of conveyance, and instruments of that character. And the plaintiff further proved by competent evidence that though the contract bears date the 29th of June, it was not in fact executed and delivered by the Commissioners before August 4, 1887. This proof was also objected to by the defendant; and the objection was taken upon the ground that it was not competent to the plaintiff to show by parol evidence that the real or true date of the con-
60 tract was other or different from that stated on its face; and that the plaintiff was estopped from showing by parol that the contract was not in fact signed by the defendant, and did not go into effect until a date subsequent to that expressed in the instrument. This objection was likewise overruled by the court, and the defendant excepted.

The contract provided for the manufacture of certain designated sizes of iron pipe by the plaintiff, and its complete delivery to the defendant, "within 136 days *after the date of the execution* of the contract; one-half of each size to be delivered on or before September 25, 1887, and the remainder on or before November 10, 1887." For failure to deliver the pipes within the time thus fixed, the contract provided that there should "be deducted from the contract price, as in said contract specified, 1 per cent. of the contract price for all delinquent articles for each and every week day that they remained delinquent." There was a further provision that for failure to complete the work at the time specified, there should be deducted from the money to become due under the contract "the sum of ten dollars *per diem* for the same period estimated as liquidated and fixed damages to the District."

In the contract there was provision made for inspecting the iron pipes and "to determine whether there was any reason for rejection, prior to delivery." Payments were to be made after August 1, 1887, for all pipe "received and accepted in proper order and condition, less 20 per cent. of the amount found due, to be reserved until the satisfactory completion of the contract."

There appears to have been a suspension in the execution of the contract, owing to misunderstandings as to the qualities of the work, and the inspection thereof; and consequently, but a small proportion of the pipe was delivered prior to November 30, 1887. But after that date, pipe worth $11,404.09, at contract rates, according to estimate made, was delivered to and accepted by the District of Columbia, and used by the corporation. The total value, at contract rates, of all the pipe delivered to and accepted by the District of Columbia, was $16,335.87, on which there was paid in cash $5,291.71, by two checks, which did not indicate that they were meant to be in full settlement of all moneys due under the contract; and the balance, $11,044.16, was more than counterbalanced by the fines and penalties charged up by the defendant for non-delivery of the pipe within the time specified in the con-

tract. It was for this balance of $11,044.16 with interest thereon from the 27th of February, 1888, that this action was brought. There is no pretense that there was any demand made by the defendant for any more or other quantity of pipe than that delivered under the contract and which was refused to be delivered by the plaintiff. On the contrary, on November 30, 1887, when Captain Symons, the Assistant Engineer Commissioner of the District, requested that no more pipe should be cast for delivery under the contract, there remained to be cast about 340,000 pounds, on which the profits to the plaintiff, at contract prices, would have been about $1,300. After the plaintiff's letter of November 30, 1887, assenting to the cancellation of the contract, *as to all pipe not then manufactured*, provided all pipe then manufactured should be taken and paid for at contract rates, without deductions, and Captain Symons' reply thereto, directing the sending on of the pipe then cast and accepted by Hoyt, the value of the pipe, at contract rates, actually shipped to the defendant, was $11,404.16. It was for this amount that the verdict was rendered, with interest, and without any allowance or deductions for forfeitures or penalties for non-delivery of pipe within the time prescribed by the terms of the contract.

Upon the whole evidence, both plaintiff and defendant offered prayers for instructions to the jury; and those on the part of the plaintiff were granted, while those offered by the defendant were refused.

By the first of the instructions given at the instance of the plaintiff, the jury were directed that, upon finding the execution of the contract, although they might find that the same "was not fully performed by either party, yet if the plaintiff cast and delivered pipe in accordance with the specifications of said contract, and the defendant accepted the same and appropriated it to its own use, the plaintiff is entitled to recover in this action the value of the pipe so accepted at contract prices, deducting therefrom the liquidated damages specified in said contract sustained by the defendant, if any, by the failure of the plaintiff to deliver the pipe within the time limited by the contract, and any payments on the same."

By the second instruction granted, the jury were directed, that if the plaintiff "was prevented from completing the delivery of pipe by it stipulated to be manufactured and delivered, under the contract offered in evidence, within the time or times therein limited, by any act or omission on the part of the defendant, then the defendant is not entitled to charge against the plaintiff any fines or penalties for such delay in delivering pipes as was occasioned by such act or omission."

And by the third instruction granted, the court informed and directed the jury, "that if the defendant by its silence or conduct caused the plaintiff to believe, on or about the 1st day of December, 1887, that all pipe thereafter delivered would be taken and paid for at contract rates, without any deduction, and thereby induced the plaintiff to act on that belief, and thereafter deliver pipe to the defendant which the plaintiff would not have otherwise done, and the

defendant accepted such pipe, the defendant is estopped from charging against the plaintiff any fines or penalties for not delivering such pipe within the time or times specified by the contract."

The prayers on the part of the defendant were substantially and in effect the converse of the instructions given at the instance of the plaintiff. They sought to have it declared to the jury, that the plaintiff could not maintain this form of action upon the contract, and therefore the verdict should be for the defendant. That there could be no recovery upon the contract for the price of the pipe furnished to the defendant after November 10, 1887. That if any recovery could be maintained by the plaintiff against the de-
61 fendant for the pipe delivered, it was the right of the defendant to charge against the price, as liquidated damages, the penalties provided for in the contract. That no interest could be properly allowed on any amount awarded to the plaintiff prior to the institution of the suit. That the contract given in evidence appears on its face to have been executed on the 29th of June, 1887, and that the plaintiff is estopped from claiming that it was executed on any other day; and that the time within which the pipe specified in the contract was to be delivered should be computed from that date.

To the ruling of the court in respect to the prayers of the plaintiff, and to the rejection of those offered by the defendant, the latter excepted, and has appealed to this court.

The appellant has assigned some eleven errors in the rulings of the court to which we have referred; but these assignments may be reduced to four or five main and controlling propositions for which the appellant contends; and they are the following:

First. That the contract was not a specialty under the seal of the municipal corporation of the District of Columbia, but a simple contract merely, and therefore an action of covenant will not lie thereon against the corporation.

Second. That it was not competent to the plaintiff below to show by parol proof that the contract was finally and completely executed and delivered by the defendant at a date subsequent to that mentioned in the contract itself; and that the date inserted in the contract is the date from which the time allowed for the manufacture and delivery of the pipe should be computed.

Third. That the manufacture and delivery of the pipe required by the contract, within the time mentioned therein, constituted a condition precedent, and that no recovery can be had in this action upon the contract for any pipe delivered to and accepted by the defendant after the time specified in the contract for the delivery of the pipe; and, consequently there was error in granting the first prayer offered by the plaintiff, the present appellee.

Fourth. That, if the appellee be entitled to recover in this action for the pipe delivered after the times mentioned in the contract, the appellant, the defendant below, was entitled to charge up and deduct from the contract price of the pipe as *liquidated damages*, the penalties provided for in the contract.

Fifth. That if recovery be allowed, no interest should be included in such recovery.

These propositions embrace the whole scope of the contentions on the part of the appellant.

1. With respect to the first of these propositions, we think there is no difficulty, and that the court below was entirely right in holding the contract to be the deed—a specialty—executed in a lawful manner by the municipal corporation of the District of Columbia. The municipal corporation has the right to adopt a seal, and from time to time, to change it. It has the right, therefore, to execute contracts under seal. The three Commissioners provided for in the organic act passed by Congress, June 11, 1878 (20 Stat., 103), are the chief executive officers of the municipal government, and contracts executed by them, under their hands and seals, intended as and manifestly are official acts, have the force and effect of deeds or sealed instruments, according to their import, and bind the corporation and not the individual Commissioners. Respecting seals, says Judge Dillon (1 Dill., Mun. Corp., sec. 190): "The same general principles apply to private and to municipal corporations. Thus, a corporation of the latter class would doubtless be bound equally with a private corporation by any seal which has been *authoritatively affixed* to an instrument requiring it, though it be not the seal regularly adopted;" citing for this proposition the cases of Bank, etc., *v.* Railroad Co., 30 Vt., 150; Tenney *v.* Lumber Co., 43 N. H., 343; Mill Dam Foundry *v.* Hovey, 21 Pick., 417; Porter *v.* Railroad Co., 37 Me., 349. A corporation may adopt any seal that it chooses for the time being or *pro hac vice;* and although it may have adopted a particular seal, it will be bound by a deed, otherwise sufficient, which is sealed *with any seal.* Bank, etc. *v.* Railroad Co., *supra;* Tenney *v.* Lumber Co., *supra;* South Baptist Soc. *v.* Clapp, 18 Barb., 36; Hutchins *v.* Byrnes, 9 Gray, 367; Mann *v.* Pentz, 2 Sand. Ch., 257. The form or material of the seal is quite immaterial; it is rather the *insignia* that furnishes the evidence of the seal. The object of a seal is to give character to the instrument and to enable it to be distinguished and recognized for that which it was intended to be. This is as well effected by a scroll with the word seal written within it, or with the initials "L. S." Hastings *v.* Vaughn, 5 Calif., 318.

Several of the cases cited in the brief of counsel for the appellee are very analogous to the present case; and without reciting the facts of those cases, it will suffice simply to refer to them by title, as they have been cited and approved in cases of more conclusive authority upon this court. The cases referred to are those of Stinchfield *v.* Little, 1 Greenl. Rep., 231; State *v.* McCauley, 15 Calf., 429; Hopkins *v.* Mehaffey, 11 Sergt. & R., 126; Tenney *v.* Lumber Co., 43 N. H., 344.

In the cases of Sheets *v.* Selden, 2 Wall., 177, 187, and Jacksonville, etc., R. R. Co. *v.* Hooper, 160 U. S., 514, the decisions of the Supreme Court of the United States would seem to be quite conclusive of the present question. In the first of the cases just mentioned, the court, by Mr. Justice Field, said: "It may be stated

generally that when a deed is executed, or a contract is made on behalf of a State by a public officer duly authorized, *and this fact appears upon the face of the instrument, it is the deed or contract* of the State, notwithstanding that the officer may be described as one of the parties, and may have affixed *his individual name and seal.* In such cases the State alone is bound by the deed or contract, and can alone claim its benefit." And the court cite in support of this principle the cases of Stinchfield *v.* Little and the State *v.* McCauley, *supra.* In the second and more recent of the Supreme Court cases mentioned, that of Jacksonville R. R. Co. *v.* Hooper, in an action of covenant, and where the instrument sued on was executed in very much the same form and terms as was the instrument in the present case, it was held, Mr. Justice Shiras delivering the opinion, that "whether an instrument is under seal or not is a question for the court upon inspection; whether a mark or
62 character shall be held to be a seal depends upon the intention of the executant, as shown by the paper;" citing the cases of Hackers' appeal, 121 Penn. St., 192, and Pillow *v.* Roberts, 13 How., 472.

In the present case there is no question made as to whether the contract is the contract of the District of Columbia, and binding upon it; that is conceded. But it is denied by the appellant that the contract is its deed, upon which an action of covenant can be maintained. This contention is wholly without foundation, as is clearly shown by the authorities to which we have referred.

2. The next question is that which relates to the admissibility of parol evidence to show that the contract was in fact executed and delivered by the Commissioners at a date subsequent to that stated in the contract. But this question we think is without reason or principle to support it. No principle is better established than that it may be averred in pleading and shown in proof that a deed, bond, or other instrument, was in fact made, executed and delivered at a date subsequent to that stated on its face. In the old case of Oshey *v.* Sir Baptist Hicks, Cro. Jac., 263, in an action of covenant, where, by a charter-party under seal, *bearing date the 8th of September*, it was agreed that the defendant should pay for a moiety of the corn which *then* was, or afterwards should be, laden on board a certain vessel, the defendant pleaded that the deed was not delivered *until the 28th day of October*, and that on and after that day there was no corn on board; and, on demurrer, it was held a good plea, because the word *then* was to be referred to the time of the actual delivery of the charter-party, and not to its date.

And so in the case of Hall *v.* Cazenove, 4 East, 477, it was held that a plaintiff could declare in covenant that the deed was *indented, made and concluded* on a day subsequent to the day on which the deed or charter-party on its face stated that it was indented, made and concluded. And in the more recent case of Steele *v.* Mart, 4 B. & Cr., 272, in an action of debt on a lease, where the lease purported on its face to have been made on the 25th of March, 1783, *habendum* from the 25th of March now last past. It was proved that the delivery was made after the day of the date, and the court of king's

bench held that the word *now* referred to the time of delivery, and not to the date of the lease. The same principle is clearly and fully stated by the Supreme Court, in the case of the United States *v.* Le Baron, 19 How., 73.

These cases are sufficient to show that there is nothing in the mere date as stated in the deed or contract to estop or preclude either of the parties from showing by parol evidence that the deed or contract was actually made and executed at a date subsequent to that stated in the deed or contract, and that, consequently, such deed or contract can only have effect and operation from the time of its actual execution.

3. With respect to the third proposition contended for by the appellant, the law would seem to be equally well settled against such contention, as it is in respect to the two preceding propositions. There is no question or dispute in regard to the fact that though the contract was not fully performed by either party thereto, according to its terms, yet there was a large quantity of pipe manufactured and delivered by the appellee and accepted and used by the appellant, under the contract; and that the further performance of the contract was determined and put an end to by the mutual consent of the parties; though the contract was not rescinded, except as to the future manufacture of pipe for delivery. In this state of case an objection is made and insisted upon by the appellant, that an action of covenant on the contract will not lie to recover the price of the pipe that was delivered, because the plaintiff cannot truthfully aver and prove that it has well and fully performed the contract on its part to be performed; and that, consequently, the price for the pipe delivered can only be recovered in an action of *indebitatus assumpsit*. But in this contention we do not concur. The pipe, the price of which is sued for, was manufactured, delivered, and accepted, under the contract, in part performance thereof, and with reference to the specifications and price agreed upon, as set forth in the contract. Why, then, should an action of covenant not lie on the contract for the price of the pipe actually delivered and accepted, if proper averments be made and proof furnished, showing why full performance was not had? There would seem to be no sufficient reason for denying the right to maintain the action.

There was a similar question raised and considered in the case of Hall *v.* Casenove, *supra*, that being an action of covenant on a charter-party for freight earned. There the charter-party bore date the *6th of February*, but it was averred not to have been executed in fact *until the 15th of March*, and it contained a covenant by the owner that the ship should and would proceed from the port, where she then lay, *on or before the 12th of February*, on her outward-bound voyage, and upon delivery of her outward cargo, take on cargo and return, etc., and the freighter covenanted that, in consideration of everything above mentioned, etc., he would pay certain freight for the voyage. The voyage was averred to have been performed and the freight earned; and it was held on demurrer, that the owner was entitled to recover in an action of covenant, without averring that the ship sailed *on or before the 12th of February;* that the cov-

enant that the ship should sail *on or before* the 12th of February being either no condition precedent, but only an independent covenant, or not of the substance of the contract, which was for the performance of the voyage for which the ship was chartered and earning the freight; or being rendered impossible to be performed by the acts of the parties themselves, in not having executed the contract till after the time appointed for doing the act, and thereby dispensing with the performance of it; therefore the defendant's plea of non-performance by the plaintiff of the alleged condition precedent, that is, the sailing of the ship *on or before the 12th of February*, constituted no defense to the action. And in delivering his opinion, Mr. Justice Lawrence said: "If the voyage has been performed, and the profits of it gained by the defendant, there can be no foundation for saying that the defendant shall not pay the freight earned."

63 The general principle is applicable in all classes of contracts, whether under seal or not, that if the party to the contract who is entitled to the benefit of a condition upon the performance of which his responsibility is to arise, dispense with, or waive, or by any act of his own prevent the performance, the opposite party is excused from proving a strict compliance with the condition on his part. This is illustrated in cases of frequent occurrence in all forms of actions on contracts. Thus, if the precedent act is to be performed at a certain time or place, and a strict performance of it is prevented by the absence of the party who has a right to claim it, or his want of readiness to accept the work or article to be furnished, or his non-observance of the conditions that are precedent and required to the performance of the contract on the part of the other party to the contract, the law will not permit that party to set up the non-performance of the condition as a bar to the recovery on the covenant or other form of responsibility, which the contract had imposed upon him. This is a settled principle in the law, sustained by numerous authorities, and we do not deem it necessary to refer to other cases upon this subject than Williams *v.* Bank U. S., 2 Pet., 96, 101, and United States *v.* Peck, 102 U. S., 64.

4. In refusing to grant the prayer of the defendant in respect to the right to charge up and deduct from the price of the pipe delivered the aggregate amount of penalties and forfeitures supposed to have been incurred for the delay in the delivery of the pipe under the contract, we think the court was entirely correct.

That prayer completely ignored all the evidence in regard to the causes of delay, and proceeded upon the theory that the right to the penalties and forfeitures was a fixed right that could not be waived, and therefore the defendant was entitled to have them deducted, even though the amount might more than counterbalance the entire amount of the price of the pipe delivered and sued for in this action. But we think the question of the right to such penalties and forfeitures was correctly and fairly submitted to the jury, by the two last of the plaintiff's prayers which were granted by the court. If the strict performance of the contract on the part of the

plaintiff was prevented by the act or course of conduct of the defendant, or was suspended by the action or acquiescence of the defendant, no claim can be justly made for penalties or forfeitures under the contract for such delay or failure to deliver the pipe. This would seem to be the simple dictate of reason and justice, and it is, moreover, in accordance with express decision upon the subject. Holme *v.* Guppy, 3 M. & Wels., 387, 389.

5. With respect to the question as to the right of the plaintiff to be allowed interest on the claim sued for, we think there is no ground for assignment of error on this appeal. The court was clearly right in refusing, on the request of the defendant, to instruct the jury that no interest should be allowed, except from the time of the institution of the suit. In the instruction given the jury on the subject of interest, the court submitted to them the question whether under all the circumstances of the case, the defendant should pay interest upon whatever amount that should be found to be due the plaintiff from the 27th day of February, 1888, the time when the last delivery of the pipe was made, and the money became due, or whether it should pay interest from a later date. We think this instruction was correct, and the court committed no error in refusing to grant the instruction prayed for by the defendant.

Finding no error, the judgment appealed from must be affirmed; *and it is so ordered.*

Judgment affirmed.

64 FRIDAY, *June 9th, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant, *vs.* CAMDEN IRON WORKS. } No. 884. April Term, 1899.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed.

Per MR. CHIEF JUSTICE ALVEY.

June 9, 1899.

65 FRIDAY, *October 6th, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant, *vs.* CAMDEN IRON WORKS. } No. 884.

A writ of error to remove the above-entitled cause to the Supreme Court of the United States was prayed by Mr. A. B. Duvall, attorney for the appellant.

TUESDAY, *October 10th, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
CAMDEN IRON WORKS. } No. 884.

It is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States, as prayed by the appellant, be, and the same is hereby, allowed, and that citation issue to the appellee.

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between The District of Columbia, appellant, and Camden Iron Works, appellee, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

67 UNITED STATES OF AMERICA, *ss:*

To Camden Iron Works, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The District of Columbia is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, — Justice of the Court of Appeals of the District of Columbia, this tenth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted Oct. 19, 1899.
SAM'L MADDOX,
Att'y for Camden Iron Works.

[Endorsed:] Court of Appeals, District of Columbia. Filed Oct. 19, 1899. Robert Willett, clerk.

68 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 67, inclusive, contain a full, true, and correct copy of the transcript of record and proceedings of said Court of Appeals in the case of The District of Columbia, appellant, *vs.* Camden Iron Works, No. 884, April term, 1899, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 24th day of October, A. D. 1899.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No., 17,591. District of Columbia Court of Appeals. Term No., 172. The District of Columbia, plaintiff in error, *vs.* Camden Iron Works. Filed December 21st, 1899.